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APR 9 1976
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners are the School Committee for the City of Boston, Massachusetts, John J. McDonough, Paul R. Tierney, Kathleen Sullivan, David I. Finnegan, Elvira Palladino, as members of said School Committee, and Marion J. Fahey, as she is Superintendent of the Boston school system. Respondents are Tallulah Morgan, and fifty-six other black parents and their children who attend the Boston public schools. Petitioners pray that a writ of certiorari issue to review the judgment of the United

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States Court of Appeals for the First Circuit entered in the above-entitled case on January 14, 1976.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not reported at this writing, but the slip opinion is reproduced in a separate Appendix, commencing at page 1.

The Memorandum of Decision and Remedial Orders of the District Court for the District of Massachusetts are reported at 401 F. Supp. 216 (D. Mass. 1975) and are reproduced in the separate Appendix, commencing at page 57.[1]

Judgments Below

The Further Remedial Orders requiring petitioners to implement the student desegregation plan of the United States District Court for the District of Massachusetts were entered on May 10, 1975, and are reproduced in the separate Appendix at page 198. The judgment of the Court of Appeals for the First Circuit was entered January 14, 1976, and is reproduced in the separate Appendix commencing at page 55.

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[1] Both the Opinion of the Court of Appeals for the First Circuit and the Memorandum of Decision and Remedial Orders of the District Court were entered *sub nom. Morgan, et al* v. *Kerrigan, et al.* As a result of a November, 1975 municipal election in Boston, petitioners David I. Finnegan and Elvira Palladino succeeded John J. Kerrigan and Paul Ellison as members of petitioner School Committee for the City of Boston on January 5, 1976. Pursuant to an Order of the District Court for the District of Massachusetts entered February 25, 1976, Mr. Finnegan and Ms. Palladino were substituted as parties defendant for Messrs. Kerrigan and Ellison, and the caption of the case in the District Court was changed to *Tallulah Morgan, et al.* v. *John J. McDonough, et al.* Petitioner Marion J. Fahey succeeded William J. Leary as Superintendent of the Boston Public Schools on September 1, 1975, and was substituted as a party defendant.

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Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1) and Rule 22(3). The judgment of the Court of Appeals was entered on January 14, 1976, and this petition for certiorari was filed within ninety (90) days of that date.

Questions Presented

In a school desegregation case, may a Federal District Court, as part of its remedy, dictate the quality of education to be offered?

What are the limits of a Federal District Court's power in the remedial phase of a school desegregation case?

Constitutional Provisions Involved

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This petition seeks review of a judgment of the Court of Appeals for the First Circuit affirming a student dese-

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gregation plan for the Boston Public School System formulated by the District Court for the District of Massachusetts and requiring petitioners to implement that plan.

Suit was brought by respondents, representing a class of all black public school students and their parents, against petitioners, the School Committee of the City of Boston, its individual members and the Superintendent of the Public Schools,[2] seeking relief against racial segregation in the operation of the Boston Public School System.

Federal jurisdiction was invoked under 28 U.S.C. § 1343. Violations of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983 and 2000D were alleged.

On June 21, 1974, the District Court found that substantial segregation existed in the Boston Public Schools and that petitioners "took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools." *Morgan* v. *Hennigan*, 379 F. Supp. 410, 424, 480 (D. Mass. 1974). It found the entire school system of Boston to be unconstitutionally segregated. *Id.* at 482. The Partial Judgment ruled that "the rights of the plaintiff class of black students and parents under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants in their management and operation of the public schools of the City of Boston," permanently enjoined petitioners "from discriminating upon the basis of race in the operation of the public schools of the City of Boston and from creating, promoting, or maintaining racial segregation in any school or other facility in the Boston school system," and ordered

[2] Also named as defendants, but not petitioners here, were the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education. The District Court found no liability against these "state defendants."

petitioners "to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants." *Id.* at 484. The Interlocutory Order preliminarily enjoined petitioners from:

> "(a) failing to comply in any respect with the Racial Imbalance Act plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974;
> "(b) beginning the construction of any new school or expansion or the placement of any new portable;
> "(c) granting transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments;
> "(d) granting transfers [of students] under exceptions to the controlled transfer policy." *Id.*

Appeal to the Court of Appeals for the First Circuit pursuant to 28 U.S.C. §§ 1291 and 1292 was taken from the District Court's judgment of liability against petitioners, the resulting permanent injunction and the interlocutory order. On December 19, 1974, the Court of Appeals for the First Circuit affirmed the judgment of the District Court. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974).

A petition for Writ of Certiorari to the Court of Appeals for the First Circuit was denied by this Court on May 12, 1975. *Kerrigan* v. *Morgan*, —— U.S. ——, 95 S. Ct. 1950 (1975).

Following its decision on June 21, 1974, the District Court commenced the exploration of appropriate remedies (A. 2), and on October 31, 1974 entered an Order dictating

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generally the contents of a citywide student desegregation plan for the 1975-1976 school year to be filed by the petitioners on December 16, 1974.[3] This Order provided that:

> "In drafting the plan, the defendants shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate and secondary, throughout the system." (A. 65).

Staff of the Boston School Department prepared such a plan, but on December 16, 1974, members of the petitioner School Committee voted not to submit it to the District Court. Notwithstanding that the "December 16 Plan" was filed with the District Court by petitioners' then counsel (A. 66), the District Court, because of petitioners' refusal to adopt the plan as their own, held three of the petitioners in continuing contempt of its October 31, 1974, Order. Following the denial of a stay pending appeal of the contempt order by the Court of Appeals for the First Circuit, *Morgan* v. *Kerrigan*, 509 F.2d 618 (1st Cir. 1975), the District Court found that the three members had purged themselves, and, on January 27, 1975, the School Committee did submit a student desegregation plan, (the "School Committee Plan") different from the plan proposed by the school department staff. (A. 4, n. 5).

An alternative student desegregation plan for the Boston

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[3] During the 1974-1975 school year, the Boston Public School System operated under a student desegregation plan of limited scope initially ordered into effect by the Supreme Judicial Court of Massachusetts and incorporated by reference into the Interlocutory Order of the District Court entered as part of its liability finding of June 21, 1974 (A. 62, 63).

Public School System was filed by the respondents on January 20, 1975, and the parties then filed comments on one another's submissions.[4] (A. 68).

On January 31, 1975, the District Court appointed two experts, Dr. Robert A. Dentler, Dean of the Boston University School of Education, and Dr. Marvin B. Scott, Associate Dean of the same school (the "experts"), to assist in the adoption of a student desegregation plan for implementation in September, 1975. (A. 68). The experts were directed to assist a panel of four masters appointed by the District Court on February 7, 1975, who were charged with considering the plans filed, holding evidentiary hearings, and making recommendations on a student desegregation plan to that Court. (A. 5, 68, 69).

After two weeks of such hearings and final arguments on their draft report, the Masters issued a final report on March 31, 1975, wherein they found the School Committee's plan inadequate because it relied primarily upon parental free choice; rejected the respondents' plan because it was educationally deficient, unwieldy and arbitrary; and rejected the December 16 plan as being vague and unduly burdensome to minorities. (A. 5, 6).

The Masters' final report proposed a new plan which incorporated certain elements of the plans submitted. (A. 69). Following hearings on objections to the Masters' plan, and after consideration of updated data furnished by the School Department in April, 1975 (A. 69), the District Court issued its own student desegregation plan on May

[4] Between the period from the District Court's June 21, 1974 liability opinion and February, 1975, the Boston Teachers Union, the Boston Association of School Administrators and Headmasters, The Boston Home and School Association and El Comite De Padres Pro Defensa De La Education Bilingue were allowed to intervene. The Commissioners of the Public Facilities Commission, the Director of the Public Facilities Department and the Mayor of the City of Boston were joined as parties defendant in September, 1974. (A. 3, 68).

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10, 1975, but deferred entry of its underlying decision until June 5, 1975, at which time the May 10 plan was included as Part V of the District Court's Memorandum of Decision and Remedial Orders. (A. 118).

On June 17, 1975, the Court of Appeals for the First Circuit denied petitioners' motion for a stay of the District Court's plan pending appeal. *Morgan* v. *Kerrigan*, 523 F.2d 917 (1st Cir. 1975).

Reasons for Granting the Writ

The District Court's finding, at the liability stage, that the respondents have been denied equality of educational opportunity has become the vehicle by which the District Court has sought to justify remedial orders which far exceed any proven constitutional violation. The District Court has ordered changes in the content of education to be offered in the schools; it has formulated educational policy; and it has entered orders requiring the expenditures of monies, not to bring about the dismantling of a dual school system, but to improve the general quality of education which is to be offered in the school system.

The District Court has proceeded to place itself in the shoes of the publicly elected petitioners, mandating its own notions of good educational policy unrelated to the demands of the Constitution. It has initiated precedent for the eradication of local control over educational policy and the wholesale operation of the public schools by federal district courts in school desegregation cases. The result has been an unrestrained, *de facto* receivership of the entire Boston School system.

To appreciate the magnitude of the departure from precedent sanctioned by the Court of Appeals in its affirmance of the District Court's plan, a brief review of the standards governing district courts in desegregation

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cases of this sort is necessary. The leading case governing the available remedial options is *Swann* v. *Board of Education,* 402 U.S. 1 (1971), wherein this Court stated that:

> "[A]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis . . . But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations . . .
>
> * * * *
>
> "No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system." *Id.* at 28.

In *Milliken* v. *Bradley,* —— U.S. ——, 94 S. Ct. 3112 (1974), this Court, elaborating on *Swann, supra,* stated:

> "[T]he task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' 402 U.S. at 15, 16." *Id.* at 3124.

This Court has made it clear that the broad, but not unlimited, remedial powers of federal courts in school desegregation cases must be directed toward remedying the constitutional violation; that is, the existence of the dual school system. When a district court aims at im-

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proving the overall quality of education and educational facilities, it has exceeded the limits of its remedial powers by ceasing to address itself to the condition that offends the Constitution.

Specifically, the District Court below mandated that the 1975-1976 entering classes at the examination schools[5] be at least thirty-five percent black and Hispanic (A. 162); that the petitioners appoint additional superintendents, principals and headmasters (A. 51, 52, 119); that certain courses that had not previously been offered be taught (A. 169-174); that two court-appointed experts supervise the assignment of students (A. 179, 181), decide program allocations (A. 53-54), and oversee the nature of instruction (A. 83); that the petitioners enter into contracts with institutions of higher education to share in the development and direction of curriculum and instruction (A. 107-110, 163-168); and that community groups be established to participate in the educational process. (A. 110, 111, 119, 187-192).

In sum, the violation of the respondents' rights to equal educational opportunity has been remedied, not merely by disestablishing the dual school system, but by changing the educational policy of the petitioners. The case has reached the stage where the District Court has decided that the respondents are entitled not only to an equal education, but to a better education, as evidenced by the District Court's statement that it was ordering the pairing of certain schools with the institutions of higher education to "improv[e] the quality of education throughout the school system." (A. 107). Since these pairings are to be "long-term commitment[s]" to "the quality of education" (A. 108), under the District Court's order, there can never

[5] The examination schools are Boston Latin School, Boston Latin Academy and Boston Technical High School. These schools have a long history of providing an excellent education to any student who has sufficient scholastic ability to keep up with their rigorous standards. (A. 100).

be a point where the petitioners "should have achieved full compliance." *Swann, supra* at 31.

The Court of Appeals for the Tenth Circuit, unlike the Court of Appeals for the First Circuit, has recognized that district courts should not venture into the area of educational philosophy.

In *Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975), the Tenth Circuit rejected the argument that school authorities could be forced to establish a receptive environment for minority students. It found that the "Cardenas Plan," which required "an overhaul of the system's entire approach to education of minorities," was beyond the limits of the District Court's remedial powers. *Id.* at 480, 481. The *Keyes* court went on to state that:

> "Courts have the power to effectuate their remedial orders by removing all obstacles to meaningful desegregation. *Brown II*, . . ., 349 U.S. at 299-300. The equitable power to order relief adjunct to desegregation is limited, however, by considerations that loom significantly in the present case. One of these, as we have noted, is the extent of the proven constitutional violation and its relationship to the ordered relief." *Id.* at 481.

In reaching its conclusion that the District Court had gone too far, the Tenth Circuit considered the following factors:

> "Direct local control over decisions vitally affecting the education of children 'has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.' *Milliken* v. *Bradley*, 418 U.S. 717, 741, 742; *Wright* v. *Council of City of Em-*

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> *poria,* 407 U.S. at 451, 469. Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels.' *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42." *Id.* at 482.

Reversing a District Court order that combined two high schools, the *Keyes* court stated that the District Court had erred in acting "solely according to its own notions of good educational policy unrelated to the demands of the Constitution." *Id.* at 483. What has been stated by the *Keyes* court has been the longstanding position of the petitioners: Where a Constitutional violation is found, then remedies, even "bizarre" remedies, may be ordered, but they must be limited functionally to desegregation.

The Court of Appeals for the First Circuit considered the petitioners' objections to the District Court's intrusion upon their function (A. 46-54), but found that the overriding justification for these encroachments, "which might otherwise be open to question" (A. 47), was that "the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay." (A. 46).

In so justifying the District Court's action, the First Circuit has enunciated a new standard. Where local school officials are intransigent and obstructionist, no longer need a district court confine its desegregative remedy to the specific constitutional violation. Rather, it is to look at the offending party and determine its attitude. Thereafter, all restraints are removed. Even though the offending party

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may not in fact have defaulted, it may be stripped of its most basic powers.

The pernicious result of such a standard is made plain in the instant case. The issue of the petitioners' default in the area of the quality of education offered on a system-wide basis in the Boston schools was never litigated. There was no evidence that the quality of education offered was in any way diminished by petitioners. Petitioners' obstruction itself was never litigated nor even in issue prior to the findings of the District Court. Nevertheless, petitioners, because of an imagined attitude, are forced to give up their powers, as elected public officials, of deciding educational policy.

The petitioners were fearful that once the door to deciding what is and what is not quality education, or what courses would or would not be taught, was opened by the District Court, it would never be closed. Subsequent events have borne out these fears. The District Court has placed one high school into receivership and ordered a complete revamping of the physical facilities at that school. Among other things, the petitioners were ordered to purchase, e.g., "glass backboards" for the basketball court, "10 to 12 new MacGregor X10L basketballs," "1 case of tape (1½" width) for taping ankles," "1 chalk pan," etc. The issues raised by these orders have been appealed and are pending before the Court of Appeals for the First Circuit. *Morgan* v. *McDonough*, No. 75-1482.

If a district court can proceed this far, then the past admonitions of this Court can be thrown to the wind.

In *Milliken* v. *Bradley*, — U.S. —, 94 S.Ct. 3112 (1974), it was made clear that:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essen-

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tial both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. 451, 469. Thus, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation and a healthy competition for educational excellence.' " *Id.* at 3125, 3126.

In his dissenting opinion in *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972), Mr. Chief Justice Burger stated:

"This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns." *Id.* at 477-478.

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This Court, in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), pointed out that:

> "Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Id.* at 43.

Again, this Court, in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly

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> and sharply implicate basic constitutional values. On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)." *Id.* at 104.

Are these decisions still the law of the land or will the federal courts be permitted now to turn to the unprecedented approaches of the District Court in this case, approaches which mandate the long-term goal of improving the quality of education in the Boston public schools and which are affirmed by the Court of Appeals with such statements as "quality [of education] is a key to this [magnet] aspect of a plan of desegregation." (A. 49).

The overbreadth of the District Court's remedy is clearly evidenced by its approach to the magnet schools. The Court of Appeals correctly notes that it was the petitioners who proposed magnet schools as an element of their desegregation plan (A. 47); but in so proposing the petitioners did not thereby invite the District Court's determination that, e.g., at East Boston High School the petitioners must introduce new fields of education which "will stress instruction in environmental protection and aviation-linked technology." (A. 171).

In dismissing petitioners' objections to the District Court's mandating the type of new programs to be put into the magnet schools, the Court of Appeals stated that "[i]mplicit in the power to use magnet schools, at least upon the default of the School Committee, is the power to specify programs essential to make them magnetic." (A. 48). There had been no default by the petitioners in this area, yet the Court of Appeals sanctioned the District Court proceeding as if there had.

Moreover, it must be noted again here, and noted with emphasis, that the District Court, in addressing the area of quality education, did not limit itself to the magnet

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schools. As the District Court, itself, said, its plan was designed

> "[t]o assist the Boston school system in developing the new magnet programs and also in improving the quality of education *throughout the school system* . . ." (emphasis added) (A. 107).

Perhaps the best example of the District Court's system-wide interference with educational policy may be found in its order that the petitioners use their best efforts to enter into contracts with colleges and universities. (A. 164). The District Court notes that these institutions "have committed themselves to support, assist, and participate in the development of educational excellence within and among the public schools of Boston." (A. 163). The District Court further notes that these commitments "shall enable participating institutions of higher learning to share in the direction and development of curriculum and instruction under court-sanctioned contracts with the School Department." (A. 164).

Clearly the District Court is no longer concerned with the eradication of the dual system, but with better education, a direction sanctioned by the Court of Appeals in the area of magnet schools on the grounds that:

> "Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised, but the supervision of compliance in this area, as opposed to student assignment for example, would have been extraordinarily complex and might well have drawn the court into purely educational decisions." (A. 49).

This is extraordinary in view of the fact that there was no showing of default by the petitioners in this area; that the petitioners were the moving force behind the magnet

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school idea; and that the petitioners have successfully operated magnet schools for a number of years. (A. 47). Nonetheless, petitioner's control over the Boston schools is usurped. The Court of Appeals concedes that the action is innovative and without precedent (A. 50), an observation with which petitioners entirely concur, since at no time has any court sought to go further than to remedy the offending condition, nor has any court imposed a remedy, as here, in the area of quality of education, where there has been no adjudication of default. More remarkable is the Court of Appeals' noting that the District Court did not want to be drawn into purely educational decisions (A. 49, 50), yet that is precisely what has happened because of the overbreadth of the District Court's plan.

Other provisions of the District Court's plan are equally contrary to prior decisions of this Court. The establishing of citizen groups to support efforts to improve quality education in the schools (A. 110, 111, 189), to resolve problems which they identify (A. 188, 190), to advise the petitioners (A. 190), and to discuss the educational needs of each district (A. 119, 192), are far beyond the powers of the District Court. The Court of Appeals, on the one hand, notes that "better quality education as a general goal is beyond the proper concern of a desegregation court ..." (A. 51), yet, on the other hand, upholds this desegregation plan which provides for the intrusion of selected citizen groups to improve the quality of education and for pairings with institutions of higher learning for the same purpose. The petitioners contend that it is their duty to improve the quality of education where it is deficient; not the District Court's duty, nor the duty of court-established citizen committees or court-appointed experts or institutions of higher learning.

The District Court ordered that the petitioners appoint three additional District Superintendents and that each community school facility be administered by an adminis-

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trator at the rank of principal or headmaster. (A. 119). The Court of Appeals dismisses the petitioners' argument that this exceeds the District Court's remedial powers by referring to information it received outside the record that the District Court's intent was that there be a "person in charge" of each school. (A. 52). The petitioners may be required, however, due to union considerations, to compensate these people at the rate of headmaster or principal. The order to have additional principals and headmasters is a purely educational decision which involves additional costs for the citizens and which in no way relates to the goals of the District Court.

The order that thirty-five percent of the 1975-1976 entering class to the examination schools be black or Hispanic (A. 162) is likewise an educational decision, since the type and quality of education to be offered may have to be changed to insure that those admitted can remain, given the veiled threat that unless the proportion of minorities is increased, the structure of the elite schools may be changed. (A. 162). There are some opinions in the educational field that these schools perform a disservice and, if the District Court shares that opinion, and if this is a better education case, then the destruction of such schools may well be the result.

That the goal of the District Court is to improve the education in the City of Boston is demonstrated by an article written by one of the District Court's experts, Robert A. Dentler,[6] "Improving Public Education: The

[6] Mr. Dentler is the Dean of the Boston University School of Education. The President of Boston University, John R. Silber, has recently written an article seeking public funds for his university. See, "Paying the Bill for College — The Private Sector and the Public Interest," *Atlantic Monthly*, Vol. 235, No. 5, May, 1975. It is clear that the District Court's orders requiring contracts with the colleges and universities, including Boston University (A. 166), will go a long way toward assisting that school in its search for funds. If the decision in this case stands, the public coffers will be depleted to assist the 'private' sector.

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Boston School Desegregation Case," *The Advocate*, Suffolk University Law School Journal, Vol. 7, No. 1, Fall 1975. Mr. Dentler boasted that "[n]o federal court order issued in the twenty years between *Brown* and *Morgan* . . . had ever been so consciously and explicitly aimed at effective improvements in public education." *Id.* at 4. He further predicts that "[a]fter the remedial order . . . every federal case concerning school desegregation will be more than what some lawyers call a 'race case.' *Every case will be a case involving detailed educational planning . . .*" (emphasis added) *Id.* at 8.

Mr. Dentler concludes by stating that "[c]ourt jurisdiction will continue indefinitely, until the judge decides that equal protection—which in education must mean improved conditions for learning—has been accomplished and is self-maintaining." *Id.* at 8. It must be noted that Mr. Dentler is in frequent contact with the District Court and could be considered its alter ego. He is the same expert whom the District Court appointed to supervise the assignments (A. 179, 181), to give attention to the nature of the instruction (A. 83), and to resolve "issues with respect to facilities utilization, program allocation and enrollment units." (A. 53).

If the decisions below stand, then Dentler is correct, and federal courts are in the education business. Clearly, this notion runs contrary to every decision of this Court and, if not overruled, will sound the death knell of local control over public schools.

The Court of Appeals for the First Circuit has sanctioned this unorthodox "remedy" by affirming the student desegregation plan. There is no precedent for these departures anywhere among the myriad of prior school desegregation

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Moreover, in a letter to the court-appointed Masters, President Silber, in March of 1975, stated that the Boston schools were inadequate and mediocre, thus helping to lay the groundwork for this better education plan without the necessity of litigating the issue.

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cases. Such a sudden and drastic departure from precedent requires this Court to intervene, lest the longstanding tradition of local control over the educational policies of public schools is wrested from the hands of the citizens and their duly elected representatives, and placed into the hands of the federal judiciary.

As previously argued, the Court of Appeals for the Tenth Circuit, unlike the Court of Appeals for the First Circuit. has recognized that District Courts should not venture into the area of educational philosophy. The conflict between the Circuits is obvious and requires immediate resolution by this Court.

Finally, the importance of this case can be seen from what has been previously stated. The City of Boston is presently suffering the financial burdens of attempting to comply with a better education decision which knows no end. Other cities may be likewise ensnarled in this type of interference unless the precedent of *de facto* receivership created by the lower courts is quickly overturned. This case presents substantial questions which should be answered now.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 9 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 75-1184, 75-1194,
Nos. 75-1197, 75-1212

TALLULAH MORGAN, et al.,

PLAINTIFFS, APPELLEES,

v.

JOHN J. KERRIGAN, et al.,

DEFENDANTS, APPELLANTS.

BOSTON HOME AND SCHOOL ASSOCIATION,

DEFENDANT-INTERVENOR, APPELLANT.

KEVIN H. WHITE, etc., et al.,

DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Matthew T. Connolly, with whom *Francis J. DiMento, James J. Sullivan, Jr., Philip T. Tierney*, and *DiMento & Sullivan* were on brief, for John J. Kerrigan, et al.

Kevin F. Moloney for Kevin White et al.

Thayer Fremont-Smith with whom *Owen S. Walker, Choate, Hall & Stewart*, and *Philip B. Kurland* were on brief, for Boston Home and School Association.

John Leubsdorf, with whom *Laurence S. Fordham, Foley, Hoag & Eliot, J. Harold Flannery, Rudolph F. Pierce, Keating & Pierce, Thomas M. Simmons, Robert Pressman, Eric E. Van Loon, Nathaniel R. Jones*, and *Roger I. Abrams* were on brief, for Tallulah Morgan, et al.

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Timothy J. W. Wise, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Margot Botsford*, Assistant Attorney General, and *Sandra L. Lynch*, General Counsel, State Board of Education were on brief, for State defendants.

Richard Hiller, with whom *Jack John Olivero*, *Herbert Teitelbaum*, *Michael Haroz*, *Jean Mirer*, and *Pamela Taylor* were on brief, for El Comite De Padres Pro Defensa De Education Bilingue.

January 14, 1976

COFFIN, *Chief Judge*. These appeals present varied challenges to orders of the district court implementing a plan of desegregation for the public schools of Boston. The consolidated cases concern the remedy phase of litigation initiated by plaintiffs-appellees, representing a class of all black public school students and their parents, against, principally, the Boston School Committee and the Superintendent of Boston Public Schools. The liability phase came to an end in 1974 with a district court finding of substantial segregation in the entire school system intentionally brought about and maintained by official action over the years. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass. 1974).[1] We affirmed, *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), and the Supreme Court denied certiorari, 421 U.S. 963 (1975).

While the liability issues were being considered on appeal, the district court, after its decision on June 21, 1974, began its exploration of appropriate remedies. The period from June, 1974, to May, 1975, was occupied with the

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[1] The court specifically found that segregative policies had operated in the following respects: in the utilization of facilities and planning of new structures; in drawing and redrawing school district lines; in developing feeder patterns determining enrollments at specific high schools; in the open enrollment policy, the subsequent controlled transfer policy and the exceptions thereto; in the hiring, promotion, and assignment of black faculty and staff. Because of the operation of the second presumption in *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973), which it found had not been rebutted, the court also held that official intentional segregation infected the elite, citywide examination schools and vocational schools and programs.

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addition of parties to the litigation,[2] hearings as to the nature, scope and objectives of a plan, submission and criticism of various plans, consideration of all proposals and preparation of a plan by a panel of masters, and, finally, the issuance of a revised plan by the district court on May 10, 1975, followed by a Memorandum Decision and Remedial Order. *Morgan* v. *Kerrigan,* 401 F. Supp. 216 (D. Mass. 1975). On June 17, 1975, we denied appellants' motion for a stay pending appeal, *Morgan* v. *Kerrigan,* 523 F.2d 917 (1975), but devised a consolidated and expedited briefing schedule, in which all parties have faithfully cooperated. During the summer of 1975 the court, counsel, school officials, teachers, parent organizations, and federal, state, and city agencies and officials worked intensively to prepare for the September school opening in compliance with the district court's order, commonly referred to as Phase II.[3] The schools are now functioning in accordance with the court's plan and orders.

The issues to be considered here are both procedural and substantive and require some further background of events. After hearings during the summer and early fall of 1974, the district court, on October 31, 1974, entered an

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[2] The original parties, in addition to the plaintiffs and the Boston defendants, included the State Board of Education (nominal defendants, although supporting the court's order and appellee here). Subsequently allowed to intervene were the Boston Teachers Union, the Boston Association of School Administrators and Headmasters, the Boston Home and School Association, and El Comite De Padres Pro Defense De La Education Bilingue. The Commissioners of the Public Facilities Commission, the Director of the Public Facilities Department, and the Mayor of Boston (hereinafter, collectively, the Mayor) were joined as parties defendant.

[3] Following the determination on liability in 1974, the district court ordered the implementation of a plan devised by the state for the 1974-1975 school year. This plan was commonly referred to as Phase I. *See* 379 F. Supp. at 483.

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order establishing guidelines[4] and date (December 16) for a plan of desegregation to be filed by the School Committee. Such a plan was prepared by the staff but, on the deadline date, the School Committee voted not to submit it.[5] It was, however, filed by the Committee's counsel. This plan called for six districts, with varying learning approaches available within each district, and "magnet" or special purpose high schools, but left with parents the choice of schools for their children.

On January 20, 1975, plaintiffs submitted a plan, accepting the six districts identified in the staff plan of December 16, 1974, but proposing a mandatory allocation of students among the schools to achieve minority enrollments that were neither too small (e.g., a minimum of 29.4 percent in elementary schools) nor too large (e.g., a maximum of 60.6 percent in elementary schools).

Also on January 20, 1975, the Boston Home and School Association (Association) filed a plan which was based on the theory that segregation in certain schools was the result of "existing residential separateness" and a policy of neighborhood school assignments, rather than of any official actions of the School Committee. To support its approach, the Association offered evidence of demographic patterns, which the district court refused to accept on the grounds that the evidence was irrelevant at the remedy

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[4] The order provided that the "starting point" for its desegregation decree would be that "the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate, and secondary, throughout the system."

[5] This action by the School Committee led to contempt proceedings and a finding by the district court that three members were in continuing contempt of the order of October 31, 1974. This court denied a stay pending appeal of the civil contempt order. *Morgan* v. *Kerrigan*, 509 F.2d 618 (1st Cir. 1975). Subsequently, the district court found that they had purged themselves, and, ultimately, on January 27, 1975, the School Committee did submit a plan, different from the staff proposal filed by counsel.

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stage of the case and that the issue raised by the offer had been litigated and finally decided in the liability phase of these proceedings. The court's refusal to consider the Association's plan is not in issue, but the Association's contention that the court should reopen the proceedings to consider, for purposes of tailoring remedies, the impact of demographic conditions on particular schools is one of the principal issues before us.

The School Committee's plan, finally submitted on January 27, 1975, *see* note 5 *supra,* also kept the six districts or zones, and allowed parents several options, ranging from electing to have their child remain in a racially mixed school, to choosing a citywide or zoned magnet school, to *any* school within the zone. Should the school chosen by the parents be dominantly black or white, the desegregative remedy would be a once-a-week (for elementary schools) or a once-every-two-week (for middle level schools) visit by paired black and white schools to a "third site" resources center for training and experience in race relations.

With these three plans on the table, the court appointed two experts to assist in evaluating plans and a panel of four masters to consider the plans — commencing with the School Committee's January 27 plan — hold hearings, and "make recommendations to the Court".[6] The masters held hearings for over two weeks, and, after hearing argu-

[6] An objection was made by the School Committee to the naming of two of the masters on the ground that their association with the Harvard Graduate School of Education constituted a disqualifying interest in the Harvard Center for Law and Education, which presently or formerly employed three attorneys representing plaintiffs. The School Committee also objected to the appointments of a third master and one expert because each had in the past supported the NAACP, which had provided financial assistance and counsel to the plaintiffs. The issue arising from the overruling of these objections will be dealt with later in this opinion. So also will be a further objection of the School Committee to the court's order awarding compensation to the masters.

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ment addressed to a draft report, issued their final report on March 31, 1975. The masters found the School Committee plan inadequate, in large part because of its reliance on parental free choice; rejected plaintiffs' plan as being educationally deficient, unwieldly and arbitrary; rejected the December 16 plan as being vague and unduly burdensome to minorities; and proposed a ten district system, one being a citywide district with magnet schools and specially appealing programs, with each of the other nine districts and some of the magnet schools being paired with specific colleges, labor and business organizations for assistanec in program enrichment. Mandatory busing was estimated by the masters to affect 10,700 to 14,900 students.

The court then called for hearings on objections to the masters' report, which commenced on April 10. In the meantime, the court had called for updated enrollment data from the School Committee. The court issued its Draft Revision of the Masters' Report on April 17, heard comments on April 18, and issued its desegregation plan on May 10. Its plan reduced the number of districts from the ten recommended by the masters to nine, redrew district lines, and reflected — on the basis of the new data — less racial disparity generally in school assignments than did the masters' plan. The plan not only precisely set forth the new districts but called for changes in the school system's administrative hierarchy, and established a system of community participation in district and citywide councils. The mandatory busing estimated by the court would affect 21,000 students. During this time of accelerated activity, the court also appointed an ad hoc committee of three attorneys to assist in obtaining support from colleges and universities, and ordered that school personnel meet and confer with personnel from the designated college or university. Late in June the court authorized the

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court-appointed experts to resolve some remaining issues relating to facilities utization, program allocation, and enrollment limits. Each of these actions by the court has been challenged, as well as the court's plan itself.

This skeletal recitation of chronology masks a year of increasingly intensive activity in collecting and updating data, preparing, evaluating, and amending plans embracing a wide variety of approaches, and, finally, devising procedures and taking action to put into effect a plan calling for a dramatically different educational system affecting some 80,000 students. The pressure of time, the problems of developing reliable data, the clash among radically differing approaches, the resistance of the School Committee, the sheer numbers of parents, students, teachers, and administrators to be informed and oriented were all part of the massive problems of implementation.

While we appreciate the labors that have taken place by all concerned, we also appreciate the necessity of giving the most careful consideration to the issues before us. Some are of large significance. Same are of little moment. For purposes of clarity, we summarize them, not necessarily in terms of importance, but in terms of their breadth and specificity.

A. *Broad challenges to the court's plan.*

1. The School Committee contends that its free choice-third site plan was constitutionally sufficient and should have been adopted.

2. The Mayor contends that, the masters' plan being constitutionally sufficient, the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, deprived the court of power to issue its own plan.

3. The Association contends that the court's plan was erroneous because the court did not confine the remedy to eliminating the demonstrable effects of the School Committee's unlawful actions.

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4. The Association, the Mayor, and by implication, the School Committee, contend that the court's plan is defective in not having given weight to the impact of the departure of white students to other schools outside the Boston school system.

B. *Detailed challenges to the court's plan.*

1. The School Committee and the Association contend that the court erred in a mechanical resort to ratios. The Mayor and the Association object particularly to the use of ratios in effecting minority assignments to the high standard examination schools.

2. The School Committee challenges the appointment of three masters and one expert and objects to the compensation of all four masters.

3. The School Committee objects to the court's encroachment on its functions:

a. In specifying magnet programs;

b. In requiring the participation of colleges and universities;

c. In requiring the systematic involvement of a City-wide Coordinating Council and Community District Advisory Councils;

d. In requiring the hiring of additional supervisory personnel; and

e. In giving supervisory power to court-appointed experts.

* * * *

A. *Broad challenges to the court's plan.*

Four sweeping criticisms have been leveled at the court's plan. The simplest is that the School Committee's plan passed constitutional muster and the court could not justifiably require more. A similar argument, taking another point of reference, is that since the masters' plan was constitutionally sufficient, the court could not, by reason of the Equal Educational Opportunities Act of 1974, require more.

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The remaining two broad scale attacks do not assert a barrier to going beyond any other plan but rely on the necessity for making further inquiries into remedial issues before a final plan is implemented. One type of prerequisite inquiry would be to ascertain the prior impact of official segregative action so that the remedy could be restricted to removing that impact. The other asserted prerequisite would be an inquiry into the likelihood of "white flight" so that a remedy may be tailored which, by minimizing such flight, would assure a maximum achievable co-education among the races.

1. *Sufficiency of the School Committee's Plan.*

Upon a finding that a school system has been operated in contravention of the equal protection clause of the Fourteenth Amendment to the constitution, the burden falls upon the local school authorities to present a plan of action to the district court to remedy the violations. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971). Only on the default of the School Committee to proffer an acceptable remedial plan is the district court empowered to fashion a remedy adequate to produce a unitary school system. *Id.* The threshold question, then, in reviewing the district court's action, is whether the rejection of the School Committee's plan of January 27 was proper.

In determining the acceptability of a proposed plan, the district court must assess the effectiveness of the plan in achieving desegregation. *Green* v. *County School Board,* 391 U.S. 430, 439 (1968). The district court, applying this standard, rejected the School Committee plan stating that it "presented no more than a hope for desegregation in Boston". 401 F. Supp. at 229. On review, we conclude not only that the district court's assessment of the School Committee plan was proper, but that if the district court had accepted the January 27 plan, we would have been

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constrained to reverse. *See Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975); *Jackson* v. *Marvell School District No. 22*, 416 F.2d 380 (5th Cir. 1969).

The plan submitted by the School Committee was, in summary, a freedom of choice plan supplemented by magnet schools and third site resource centers. The school assignment process was to be based upon a series of options available to the students and their parents. Starting with the option to remain in the school attended in the previous year if it had been desegregated under Phase I, the student could choose in succeeding options to attend a citywide magnet school, a zonal magnet school, a school in which his race is in the minority, and finally, any school in the zone. At the end of this five step, seven week process a review committee would determine a course of action to deal with over-subscribed schools.[7] In the event that schools remained "racially isolated", defined by the school department as more than a 15 percent deviation from the racial ratio for that level in the zone, the plan provided for mandatory student participation in resource center activities. The resource center proposal called for integrated educational experiences at a third site, once a week for elementary students, once every two weeks for middle school students and a human relations course for high school students. The entire plan rested on student and parental choice to desegregate the schools.

It is well established that freedom of choice plans to desegregate school systems are not per se unconstitutional. *Green, supra.* In order for such a plan to be constitu-

[7] According to this plan, various options were to be considered to deal with oversubscribed schools. These included the use of temporary classrooms, and extension of the school year to increase capacity. The use of temporary classrooms to enable white schools to operate in excess of their capacity was found to be one of the bases of liability in this action. *Morgan* v. *Hennigan, supra*, 379 F. Supp. at 427-28.

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tionally acceptable, however, it must promise to be as effective in achieving a unitary desegregated system as any alternative and feasible plan. *Id.* Freedom of choice has a long history of failure in achieving desegregation both in the south, *Swann, supra; Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968); *Green, supra,*[8] and in other parts of the country, *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972) (Las Vegas); *Spangler* v. *Pasadena City Board of Education,* 375 F. Supp. 1304 (C.D. Cal. 1974). To be sure, it may be argued that voluntary plans were less promising in the South than in the North, as segregated dual systems were deeply entrenched there, having had an express legal basis. Yet as the district court's findings indicate, Boston had gone far in the creation of a de jure dual system. Boston, moreover, for ten years had a policy of open enrollment, followed by a controlled transfer policy riddled with exceptions. In an earlier stage of the present case the district court found that this policy served to increase, rather than decrease, segregation in the school system. *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 449-59.

The School Committee contends that its plan, although founded on freedom of choice, held promise to achieve desegregation due to the heavy reliance on magnet schools and alternative program schools — some fifty in number. Like freedom of choice, the use of magnet schools to achieve voluntary desegregation has failed elsewhere,

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[8] *Accord, Bivens* v. *Bibb County Board of Education,* 424 F.2d 97 (5th Cir. 1970); *United States* v. *Board of Education of Baldwin County,* 423 F.2d 1013 (5th Cir. 1970); *United States* v. *Hinds County School Board,* 417 F.2d 852 (5th Cir. 1969); *United States* v. *Jefferson County Board of Education,* 417 F.2d 834 (5th Cir. 1969); *Hall* v. *St. Helena Parish School Board,* 417 F.2d 801 (5th Cir. 1969); *Jackson* v. *Marvell School District No. 22,* 416 F.2d 380 (8th Cir. 1969); *United States* v. *Lovett,* 416 F.2d 386 (8th Cir. 1969); *Anthony* v. *Marshall County Board of Education,* 409 F.2d 1287 (5th Cir. 1969); *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969).

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Bradley v. *Milliken*, 484 F.2d 215, 243 (6th Cir. 1974), *rev'd on other grounds*, 418 U.S. 717 (1974); *Kelly* v. *Guinn*, *supra*; *Spangler* v. *Pasadena City Board of Education*, *supra*; *Dowell* v. *Board of Education*, 338 F. Supp. 1256, 1264 (W.D. Okla. 1972). *Compare Hart* v. *Community School Board*, 512 F.2d 37, 54-55 (2d Cir. 1975). Although Boston has had experience with one school which offered a specialized program and achieved a racially mixed student body,[9] we must agre with the district court that schools offering programmatic alternatives, while a useful supplement to an otherwise adequate desegregation plan, could not realistically sustain the burden of achieving desegregation of the Boston city schools.[10]

Finally, the School Committee plan to remedy "racial isolation" with part-time integrated resource centers added nothing to the effectiveness of the overall plan. The objective sought to be achieved in a remedial plan is desegregation, not interracial experience or racial balance. *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Accordingly, similar part-time programs have been categorically rejected elsewhere, *Keyes* v. *School District No. 1*, *supra*, 521 F.2d at 477-79; *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 503 (5th Cir. 1974); *United States* v. *Texas Education Agency*, 467 F.2d 848, 859 (5th Cir. 1972), and must be rejected here.

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[9] The Trotter School was designed to offer cultural enrichment programs for children from AFDC families. White students residing in AFDC homes from outside the city of Boston made up part of the student body. 379 F. Supp. at 430.

[10] The masters found:

> "The magnet concept as devised by the Committee is unrealistic and unworkable. Magnet programs could assist desegregation if they satisfied certain conditions. They must be limited in number, and they must be carefully placed, so that the effect of the applications they attract is to promote desegregation. The Committee Plan, which proposes the introduction of many magnet programs, satisfies none of these conditions, and could not possibly be put into operation by September, 1975."

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Against this historical background which promised failure for every feature of the School Committee plan, it is inconceivable that anyone, the School Committee members or the court, could believe that the plan would be effective in eliminating and guarding against officially imposed segregation in Boston.[11] The district court, therefore, was clearly correct in declaring the School Committee in default of its obligation to present a constitutionally adequate plan. It was the district court's unquestionable duty to utilize all the resources available to it as to fashion expeditiously a remedy that realistically would produce a unitary school system. *Swann, supra.*

2. *The Constitutional Adequacy of the Masters' Plan and the Applicability of the Equal Educational Opportunities Act of 1974.*

The Mayor's principal attack on the court's plan, essentially joined in by the Association, is that, since the masters' plan was constitutionally sufficient, the court was without power to require more busing than that contemplated by the masters. The source of this alleged limitation is the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758. The Act manifests an in-

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[11] Comments of a member, and of the then Chairman, are revealing:

> "The plan is 'pie in the sky.' It is a contradiction, it is impossible. All of us would love to see a voluntary desegregation system put into effect. It is not a practical reality. Of course I will vote for this."
>
> "I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists . . . but the only way you are going to desegregate city schools is through forced busing."

The only member of the School Committee to refuse to vote for the plan stated:

> "I agree that it would be an ideal solution and therefore will not vote against it, but I will vote 'present.' I believe we should have our votes consistent with what we feel is a reality." Remarks of Member Sullivan, Emergency Meeting of the Boston School Comm., January 7, 1975.

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tention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution. Section 1712 states that a court shall "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[12] Section 1713 requires a court to consider, make specific findings about, and adopt a series of less onerous devices before requiring busing. These include school assignments close to home, transfers which would improve racial balance, revision of zones, and the construction of new schools and magnet schools.

The Mayor's argument proceeds simply: the masters' plan contemplated mandatory busing for 6,100 fewer students of the 84,000 total student population than did the court's plan; the court did not find that the additional compulsory transportation was required by constitutional necessity; and comparison with other cases demonstrates that in fact the masters' plan was constitutionally sufficient; therefore, the court exceeded its powers.[13]

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[12] One provision, § 1714, facially proscribes any court ordered transportation of a student to a school other than one "closest or next closest to his place of residence" of the appropriate grade level and type of education. The Mayor properly concedes that this section must be read in conjunction with § 1702(b) which states that provisions of the Act "are not intended to modify or diminish the authority of the courts . . . to enforce fully . . . the Constitution. . . ."

[13] The Association also argues that the adoption of the masters' plan was required by F. R. Civ. P. 53(e)(2), on the theory that the "delineation of districts was a factual determination" which could not be changed by the district court unless found to be clearly erroneous.

This argument misconceives the types of reference made in this case. Rule 53(c) provides that "[t]he order of reference to the master may specify or limit his powers", and that was done in this case. The Order of Appointment and Reference to Masters of February 7, 1975, specified that the masters were "to conduct hearings and make recommendations for a desegregation plan for Boston public schools together with the reasons for recommending that plan, including discussion of the key issues." This clearly

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The masters filed their final recommendations on March 31, 1975. On April 10 the school department furnished new statistics on the size and racial composition of the student body, on the basis of which the court modified the recommended plan. As noted by the district court in its May 28 order denying a stay, "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court." The most significant change effected by the court was a change in the number of geographic districts from nine to eight. The appellants assert that this change required more busing than the masters' plan would have required had it been updated to reflect the new figures. While this basic factual promise is open to some doubt, we need not rest our decision on such a necessarily elusive determination.[14]

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described a mission not involving findings of fact meriting deferential treatment under Rule 53(e)(2). That rule's mandate simply "does not . . . apply where the master is directed only to report the evidence [and] to make recommendations . . . ." 5A J. Moore, Federal Practice ¶53.12[2], at 3002; *Matter of Van Swearingen Corp.*, 180 F.2d 119 (6th Cir. 1950). *See Hart* v. *Community School Board*, 383 F. Supp. 699 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). This reference was not a substitute for trial, where the master to a large extent takes over the fact-finding process; the district judge could not delegate his duty to evaluate for himself what actions had to be undertaken in order to remedy past failure to comply with the constitution. Indeed, we doubt that the determination of district boundaries is accurately described as purely factual in nature, given the nature of this case.

It is uncontested, moreover, that the figures on which the masters relied in drawing their districts were outdated and invalid in light of new figures submitted by the School Department shortly after the masters' final report was filed. Both as to racial composition and numbers of students in the districts, the new figures rendered the factual assumptions underlying the masters' determination clearly erroneous.

[14] The estimate of 6,100 additional students who would be bused under the court's plan (21,000-court minus 14,900-masters) ignores the impact of the new data, even had the masters' districts remained essentially intact. For example, the Burke district, eliminated by the court, had a capacity of 8,250 and an enrollment projected by the masters of 7,590. But the new statistics revealed it as containing 11,620 students. Even after assuming that some

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We proceed to examine the district court's duties and powers, as they are affected by the Equal Educational Opportunities Act of 1974; whether the court purported to be guided by the Act; and whether its findings and conclusions are sufficiently supported.

Prior to the passage of the Act it was clear that the mandate governing federal judges was to accomplish "the transition to a unitary, nonracial system of public education" in which "racial discrimination would be eliminated root and branch." *Green, supra,* 391 U.S. at 436, 438. They were to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971).

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of the overflow would be absorbed by citywide magnet schools, there would remain perhaps 2,000 excess students. The Mayor does not show that shifts in district lines to accommodate these students either by merging contiguous neighborhoods and their schools into Burke or by removing fringe neighborhoods from it would not encounter the difficulty of increasing Burke's percentage of black students, already a high 63%. Although the amount of additional busing that would have been needed to take care of this situation is a matter of conjecture, it would appear to be substantial, if increased segregation were to be avoided.

Not only student population but racial concentration estimates of the masters were at odds with the realities of the new figures. The following discrepancies were found to exist:

	Master's final report	New figures applied by court to masters' districts	Possible result of allowed deviation of ± 10 percentage points within each school
West Roxbury	80% W	93% W	100% W
South Boston	60% W	67% W	77% W
Burke	50% B	63% B	73% B

The result, particularly when the ± 10 point deviation is considered, represented substantial changes, unanticipated by the masters. While the masters gave greater weight to neighborhood identity than did the court, it is far from clear that they would have tolerated the higher concentrations shown by the new data.

The Mayor's assumption that the court's plan would involve anything close to the mandatory busing of 6,100 more students is therefore significantly vulnerable.

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And in so doing, "the scope of [their] equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann, supra,* 402 U.S. at 15 (1971).

The Act disavows any intention to encroach upon the obligation of the courts "to enforce fully" the constitution, § 1702(b). Moreover, it places reliance on specific findings with respect to the efficacy of particular remedies in the "priorities" section, § 1713, and on a more general finding of the inadequacy of other remedies in § 1755. By explicitly leaving the district court the power to determine the adequacy of remedies, the Act necessarily does not restrict the breadth of discretion of that court to determine what scope of remedy is constitutionally required. Thus the Act manifests a purpose not to limit judicial power but to guide and channel its exercise. In a sense it is a statutory "less restrictive means" guideline, endeavoring to ensure that substantial compulsory transportation be used as a last resort. Our reviewing function remains the limited one of scrutinizing the record for sufficient factual support for the scope of the remedy, its reasonableness and its feasibility. *See Swann, supra,* 402 U.S. at 31. The Act adds the factor that the district court's findings must reflect a substantial consideration of the less restrictive means which Congress has required to be explored and used prior to restoring to compulsory transportation of any magnitude.[15] We turn therefore to an analysis of these two areas.

Initially, we look to whether the remedy imposed in this case reflected the channelling contemplated by the Act. On this question, there can be little doubt. The district court

[15] As the court said in *Brinkman* v. *Gilligan,* 518 F.2d 853, 856 (5th Cir. 1975), "We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case."

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clearly purported to be guided by the Act's mandate. In the course of presenting its plan, the court stated:

> "Assignment of every student to the school closest or next closest to his residence, considering only school capacity, natural physical barriers or both, along with grade level and the type of education provided, cannot achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic distribution in the city. 20 U.S.C. § 1713(a)(b), § 1714. Revision of attendance zones and grade structures, construction of new schools and the closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formation of the plan here adopted in order to minimize mandatory transportation. 20 U.S.C. § 1713. The court finds, however, that some transportation of students to schools other than those next closest to their residence is required to remedy adequately the denial of plaintiffs' constitutional rights and to eliminate the vestiges of a dual school system in Boston. 20 U.S.C. § 1702(b), § 1714(a)." 401 F. Supp. at 264.[16]

We do not understand the Mayor to contest these findings; nor would there be any basis in the record for such a challenge. Rather, the Mayor's theory goes less to which type of remedy (e.g., busing, magnet schools, etc.) was used by the court than to whether the remedial plan as a whole

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[16] Additional comments in the same vein are to be found in various parts of the court's opinion filed subsequent to the plan itself:

> "The plan that the court has ordered into effect reflects the court's continuing efforts to hold compulsory busing to a minimum." "The districts in this plan and the guidelines for assigning students have been drawn to minimize required transportation as much as possible consistently with desegregating the city's schools." "The plan adopted by the court attempts to minimize forced busing."

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effectuated more desegregation (and as a result more busing) than was required. Since this argument concerns the district court's discretion in determining the adequacy of the remedy, and therefore gains nothing from the Act which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in existence. We turn, therefore, to those principles and our traditional reviewing function.

It is important to understand what the court's plan accomplished. Assuming that it involves the forced busing of up to — but probably substantially fewer than — 6,100 more students than the masters' plan, what did it get in return? We see the plan as one involving relatively unskewed, contiguous, compact districts without extensive gerrymandering or satellite zoning. It should be borne in mind that compulsory busing occurs only within, not between, districts. Although both the masters' plan and the court's plan leave the East Boston schools 95 percent white, the court's plan eliminated the other virtually one-race schools (as would have existed under the masters' plan in West Roxbury, 93 percent white) and many racially identifiable schools (predictable for the masters' Burke district, 63 percent black). It reduced the racial distortion in the three districts which, under the masters' plan (as the new figures affected it), would have been markedly disproportioned. By reducing racial identifiability, the plan did more to avoid the dilemma of either denying a district's pupils access to citywide schools or allowing the district to lapse back into a one-race status. That the plan was not perfectionist is shown by the parameters of its district ratios, the percentage of whites ranging from a high of 61 percent to a low of 40 percent, in a school population 52 percent white, 36 percent black, and 12 percent other minority. Moreover, a 25 percent deviation

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was permitted for each district school. This compares with parameters in the masters' plan, when the newer School Department data are taken into account, which are substantially more extreme at both ends. As for the compulsory transportation, the maximum is a 5 mile, 25 minute trip, the average being 2½ miles, 10 to 15 minutes.

Could the district court have reasonably found this additional desegregation to be constitutionally required?[17] To put it another way, does the court's plan go beyond "every effort to achieve the greatest possible degree of

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[17] The Mayor would have us answer this question in the negative by referring to other cases, affirmed by courts of appeals, where more schools were allowed to remain all black or more dominantly black than the masters' plan contemplated. Apart from the Mayor's assumption that the masters' plan contemplated no school more than about 53% black an estimate which, in the light of the new data, should be closer to 73% — we reject such a simplistic color matching test to determine the constitutional sufficiency of any plan.

The cases cited by the Mayor reveal the hazard of picking as a control any one statistic of residual racial imbalance which another court may have approved. In three cases, *Mims* v. *Duval County School Board*, 329 F. Supp. 123 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971); *Goss* v. *Board of Education*, 482 F.2d 1044 (6th Cir. 1973) (en banc); and *Northcross* v. *Board of Education*, 489 F.2d 15 (6th Cir. 1973), geographic factors and, at least in *Mims* and *Northcross*, the desire to avoid extensive long distance busing were relied upon to justify the lesser degree of desegregation attempted. In two cases, *Pate* v. *Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970) and *Ross* v. *Eckels*, 434 F.2d 1140 (5th Cir. 1970), while more all black schools were permitted to remain, the courts of appeals had insisted on reducing the number of pupils attending such schools to around 5% of the total school population. Were we to take this statistic as a control, we would have to declare the court's plan, which leaves over 7% of the total student population attending the East Boston white schools, constitutionally inadequate. The remaining case, *Carr* v. *Montgomery Board of Education*, 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir. 1975), concededly insisted on a less stringent plan. Whether the desire to avoid cross-city busing would be, in our minds, sufficient to justify the lower objective, we have no reason to decide. The exercise of one district court's discretion, in a particular case, though affirmed on appeal, cannot establish constitutional limits for other courts facing other circumstances.

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actual desegregation, taking into account the practicalities of the situation"? *Davis, supra,* 402 U.S. at 37. The "practicality" of white flight is not a viable basis for declaring the plan invaid. *See* part A 4, *infra.* Apart from the practicality of geography which induced the court to exempt East Boston from Phase II, we see no other geographical factor of significant dimensions. To the extent that funding is a problem, we note that virtually the entire expense of any incremental busing is fundable by the state Board of Education, which supports the court's plan. *See* Mass. G.L. c. 15, § 1I; c. 71, §§ 7A, 7B, 37I(ii). The amount of additional desegregation which was "purchased" by the court's plan was neither trivial nor disproportionately burdensome. When we ask ourselves whether a slight increase of maximum percentage of planned white enrollment at some schools, or leaving some elementary schools unaffected, or adding a few more magnet schools would achieve the constitutional minimum with less compulsory busing, we realize that the concept of the minimum cannot be identified with precision. Whatever prescription may be adopted by a judge, after months and years of consideration, it is doubtless always possible to make a case that something less will do. We have no basis for holding that the court exceeded its obligation to do all that it feasibly could to extirpate the effects of the constitutional violations over the years.

3. *Alleged Overbreadth of the Remedy.*

On January 20, 1975, the Association submitted a desegregation plan that was designed to restore the racial composition of the Boston schools to that which they would have had in the absence of any illegal official action. It contended that the district court was obliged to determine the extent to which the segregation in the Boston schools was attributable to official action and to limit the remedy to eliminating only that segregation. The factual premise of the Association's plan was that the racial

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composition of most of Boston's elementary schools and of two of its high schools, Charlestown and East Boston, is the result of residential patterns in Boston and not of the illegal acts of the School Committee. Its plan, accordingly, provided that these schools should not be affected by the court's remedy.

Since the Association's plan challenged the remedial guidelines contained in the district court's order of October 31, 1974, the district court treated the Association's document as both a motion to modify the remedial guidelines prescribed by that order and as a proposed desegregation plan. The district court held a hearing on the issues presented by the Association on January 23, 1974. In support of its plan, the Association offered to introduce evidence that would establish that population patterns, not illegal state action, caused the existing racial segregation in the schools in question. The district court denied the motion to modify the remedial guidelines, holding that the Association's remedial theory was inconsistent with the controlling Supreme Court precedents.[18] The court also held that the Association's desegregation plan was constitutionally inadequate and could not be considered by the masters. Finally, the court refused to admit the Association's evidence, on the grounds that it was irrelevant since the only question before the court at that time was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances and that the motion represented an attempt to reopen the findings of fact made by the district court at the liability stage of the proceedings and affirmed by this court. The Association has appealed, contending that the district court erred, first, in refusing to frame the

[18] The district court also ruled that modification was not required by the Equal Educational Opportunities Act of 1974. *See* note 24 *infra*.

remedy in terms of the specific consequences of the proven constitutional violations, and, second, in rejecting the evidence that the racial segregation in particular Boston schools was not the result of any state action.

The central question on appeal is whether the district court erred in refusing to accept the Association's remedial theory. In support of its theory that the district court must ascertain the extent to which state action caused the existing segregation in the schools and limit its remedy to eliminating that segregation, the Association relies upon the language of the Fourteenth Amendment itself. Since the amendment prohibits only state imposed racial segregation, *see Civil Rights Cases*, 109 U.S. 3 (1883), the Association contends that a district court's remedial power is limited to remedying the specific effects of the "state action" that formed the basis of the constitutional violation.

Although the theory possesses some surface plausibility, the Supreme Court precedents clearly establish that the district court was correct in rejecting the Association's proposed modification of its remedial guidelines. The remedial principles set forth in *Swann*, *Davis*, and *Green* do not tolerate anything less than ensuring that the effects of constitutional violations are eliminated, and we are certain that the application of the Association's remedial theories could not eradicate the effects of state imposed segregation.[19]

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[19] A remedy may sometimes properly "exceed the violation" in that it may do more than eradicate the constitutional wrong. To the extent that "overbreadth" in the remedy is necessary to ensure that the constitutional violation is corrected, it is not at all unusual. There are many instances in the law in which remedial law places greater restrictions on primary activity than did the substantive law that had been violated. For example, a company that is found to have violated the Sherman Act will have its future operations governed by a much more restrictive standard than that imposed by the Sherman Act itself. *See United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

To appreciate why the Association's remedial theory must be rejected, it will be helpful to consider the nature of the constitutional violation. In the first stage of this case, the district court found that the School Committee's policies regarding the construction of new facilities, the use of portable classrooms, overcrowding, districting and redistricting, feeder patterns, open enrollment, transfers, and faculty and staff assignments "were all marked by segregative intent" and substantially contributed to the segregated character of dozens of Boston schools. 379 F. Supp. at 426-30, 433-37, 442-45, 455, 459, 466-68, and 472. The latter part of the district court's opinion dealt specifically with the School Committee's defenses that the racial segregation in the Boston schools — which it conceded to exist — resulted from private residential patterns and/or its racially neutral neighborhood school policy. The district court found that Boston had never followed a true neighborhood school policy and rejected the defense, relying in part on its earlier findings. 379 F. Supp. at 469-74. These specific findings many of which related to elementary schools, were the basis for the determination that Boston's school system as a whole violated the Fourteenth Amendment. Although the defendants could have limited the geographic scope of the violation by proving that parts of the Boston school system were geographically unrelated to the rest of the system and had not been operated with "segregative intent," *Keyes, supra,* at 203-05 and 210-13, the School Committee failed to satisfy this burden with respect to any portion of the system. We affirmed the district court's findings and legal conclusions in their entirety, *Morgan* v. *Kerrigan, supra.*

The Association, in effect, argues that the trial on liability should be treated as the first of two battles, and that the second battle should involve a more particularized inquiry into the causes of the segregation at the individual

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schools within the system. Although the defendants failed, at the trial on liability, to persuade the district court that private residential patterns alone caused the segregation in the Boston schools, the Association maintains that the district court must, at the remedy stage, reconsider the effects of non-official action, determine the degree to which private action caused the existing segregation, and fashion a remedy that preserves the segregation that can be separated from governmental causation. This second battle would be considerably more complicated than the first. The logical implication of the Association's proposal is that it would be proper for any group connected with any school to introduce proof that that school's racial profile was only partially attributable to official action. The district court could be faced with the task of making percentage findings as to every school in the district.

The short answer to the Association is that its position is squarely contrary to the remedial principles of *Swann*, *Davis*, and *Green*.[20] *See also Keyes*, *supra*, at 200 and 214.

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[20] The Association recognizes that *Swann*, *Davis*, and *Green* provide that, during the remedial phase of a school desegregation case, the district court must order the maximum practicable desegregation regardless of the degree to which the actual segregation in the schools is demonstrably the result of unlawful state action. The Association attempts to distinguish these cases on the ground that each involved school systems that had been segregated by statute for years. In such school systems, the Association contends that the application of these remedial principles was warranted because all segregation could be presumed to be the result of illegal official action.

The Association's attempt to limit the applicability of these remedial principles to cases in which there had previously been a statutory dual school system fails. In *Swann* and *Davis*, the Court clearly did not proceed on the assumption that the application of its remedial principles would operate only to eliminate the segregation which was directly attributable to illegal official action. The Court recognized that the segregation in those systems that remained after the school authorities abolished the statutory dual system and adopted a "neighborhood" school policy was, to some extent, a consequence of private residential patterns. *See*

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These cases establish that when intentional official action has significantly contributed to segregation in substantial portions of a school system, the individual schools in the system must be subjected to the maximum feasible desegregation if official action "created or maintained" the racial segregation contained therein. *Swann, supra,* at 21 and 28. *See Keyes, supra,* at 214. In the Boston case, the School Committee had the opportunity to prove that official action had not contributed to the segregated character of some of the individual schools in the system, but the district court found that the School Committee had failed to satisfy this burden.[21] Hence, under *Swann,* the district

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Swann, supra, at 25-26; *Davis, supra,* at 36. The Court clearly provided that, although all the remaining segregation in certain schools may not be attributable to illegal state action, the schools must be subjected to the maximum practicable desegregation. *Swann, supra,* at 21 and 28.

The lower federal courts have consistently rejected desegregation plans that attempted to justify the failure to desegregate certain schools on the ground that the racial composition of those schools results from housing patterns. Maximum feasible desegregation is required unless the school authorities can demonstrate that their actions in no way contributed to the segregated character of the individual schools. *See, e.g., Lee* v. *Macon County Board of Education,* 488 F.2d 746 (5th Cir. 1971); *Goss* v. *Board of Education of Knoxville,* 443 F.2d 632 (6th Cir. 1971) *Clark* v. *Board of Education of Little Rock,* 465 F.2d 1044 (8th Cir. 1972); *Brewer* v. *Board of Education of Norfolk,* 397 F.2d 37 (4th Cir. 1960).

[21] The Association places extensive reliance on the language in *Swann* that provides that school authorities may, at the remedy stage, attempt to limit the geographic scope of the remedy by proving that the racial composition of the schools in certain areas in the system is in no way the result of present or past discriminatory action on their part. *Swann, supra,* at 26. *Swann,* however, cannot be read as supporting the proposition that causation is at issue during the remedial phase of a school desegregation case when there has been a trial on liability. The burden this language describes is essentially identical to that which the presence of substantial intentional segregation shifts to the School Committee during the trial on liability. *See Keyes, supra,* at 203-05, and 210-11. In *Swann,* the school authorities were afforded the opportunity to satisfy this burden at the remedy stage of the proceedings because here had been no trial on liability. Here, of course, the school authorities have had their chance.

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court was obligated to fashion a remedy that would accomplish the greatest amount of system-wide desegregation taking into account the practicalities of the situation. *Swann, supra,* at 15-16; *Davis, supra,* at 37.

The Supreme Court has tacitly recognized the impotence of a remedy designed only to eliminate the demonstrable effects of past official conduct. While de jure segregation may not have been established at each and every school in a system, "common sense", to use the words of the Court, supports the conclusion that effects of the proven discriminatory actions pervade the school system as a whole. *Keyes, supra,* at 201. Acts that establish one school as white or as black will have a reciprocal effect on the racial composition of nearby schools. *Id.* at 202-03; *Swann, supra,* at 20-21. The use of various devices to earmark schools according to their racial compositions may well have had a "profound effect on the racial composition of the residential neighborhoods within the [city], thereby causing further racial concentration within the schools." *Keyes, supra,* at 202. "People gravitate toward school facilities just as schools are located in response to the needs of the people." *Swann, supra,* at 20.[22]

From a practical point of view, the problems of determining what the racial composition of neighborhoods would have been, absent the unlawful discrimination, would be especially acute in such a case as this where the school authorities did not follow a genuine neighborhood school policy and where one form of discrimination was the locating of new schools and the overcrowding of existing

[22] For example, although a dominantly white school in a white neighborhood may appear to be wholly the result of the ethnic patterns of the neighborhood, when the School Committee has taken steps to incorporate the residential segregation into the schools, to earmark that school as a white school, and to permit white students from other parts of the city to attend it, that school has played a major role in skewing the racial profiles of the other schools in the system.

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facilities. 379 F. Supp. at 427-29, 469-74; *see Keyes, supra,* at 211-13. The task of unscrambling cause and effect would be, to understate it, awesome.

Even if we assume that the district court could re-examine each school to determine the shares of segregation attributable to public and private action, the application of the Association's theory would fail to vindicate the constitutional rights of many students presently enrolled in the Boston schools. It, of course, is the rights of the individual students that are in question. *Morgan* v. *Kerrigan,* 509 F.2d 599, 600 n. 3 (1st Cir. 1975); *see Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954). Even if the court could reliably determine that 40 percent of a school's segregation was caused by official action and 60 percent by private residential patterns, it could not bifurcate an individual student. The result would inevitably be that some victims of the School Committee's official policy would be forced to continue a segregated education.

Apart from the failure of the Association's theory to remedy the violations of individual rights per se, its adoption would seem to us to turn the process of desegregation on its head. Unconstitutional segregation is defined not only by percentages but also by community and administrative attitudes, *see Keyes, supra,* at 196, and by psychological effects, *see Brown, supra,* at 494. To require a district court to preserve intact every scrap of segregated education that somehow can be separated from governmental causation is to involve the federal courts in planning continued segregation and in perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage. *Cf. Wright* v. *Council of City of Emporia,* 407 U.S. 451, 465-66 (1972).[23]

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[23] The Association places considerable reliance on *Milliken* v. *Bradley,* 418 U.S. 717 (1974), and, in particular, on its statement that "the remedy [in a school desegregation case] is necessarily

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We add one further observation. The court had found that in the past the School Committee had given racially isolated black schools less support, particularly in the quality of faculties supplied, than other schools. The court had good reason to believe that if black and Hispanic students were not spread, visibly and bodily, in the mainstream among schools throughout the system, the racially identifiable schools in which they remained would continue to invite discriminatorily unequal treatment evading timely and effective remedy. A racially mixed population in each school would, on the other hand, be an insurance policy against any purposefully unequal allocation of resources. While the liability phase of this case primarily involved discriminatory separation, the realistic prospect of discriminatory inequity of support for schools which, though no longer subject to racial districting, transfer, or other such policies, remained predominantly black is a pragmatic factor further supporting the court's remedial order.

It is clear, therefore, that practical considerations as well as established principles mandated the rejection of the Association's remedial theory.[24] Hence, we hold that

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designed, as are all remedies, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746. Although we understand why the Association believes this language supports its position, we read this language as entirely consistent with the continued application of the remedial principles of *Swann* and other such cases. As we have demonstrated, restoring the victims of unconstitutional segregation requires far more than eliminating the specific, demonstrable effects of the proven discriminatory acts. Restoration is necessarily a complex and widespread process.

[24] The Association also contends that the Equal Educational Opportunities Act of 1974 required the district court to adopt its remedial theory. In particular, the Association points to § 213 of the Act, which provides that "in formulating a remedy for . . . a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of . . . equal protection of the laws." 20 U.S.C. § 1712. This language, like the statement from *Milliken* v. *Bradley*, 418

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that district court did not err in refusing to modify its remedial guidelines.

It follows that the district court was correct in refusing to admit the Association's evidence on the causes of the existing segregation in the Boston schools. To the extent that the evidence was offered to establish the degree to which illegal state action had caused the racial segregation in the Boston schools, the evidence was legally irrelevant at this stage of the proceedings.[25] The only question before the district court was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances. To the extent that the evidence was offered to rebut the *Keyes* presumptions, it came too late and was barred by established principles of preclusion.[26] It is elementary that the district court was

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U.S. 717, 746 (1974), discussed in note 23 *supra*, is entirely consistent with the continued application of the remedial principles of *Swann*, *Davis*, and *Green*. Because of the pervasive effects of the School Committee's actions, maximum practicable desegregation *is* "essential to correct [the] particular denials of equal protection [that occurred]." *See* note 23 *supra*.

[25] At oral argument, the Association argued that the Tenth Circuit's recent decision on remand in *Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975) (*Keyes II*), supports its contention that, even after a trial on liability, the district court is under an obligation to receive evidence on the discriminatory effects of the proven violations as part of its task in fashioning a remedy. *Keyes II* in no way supports this proposition. The evidence the district court admitted in *Keyes II* pertained to the question of liability, not to remedy. *Id.* at 471-73.

[26] The Association suggests that it should be permitted to attempt to rebut the *Keyes* presumptions now because the defendant School Committee was not afforded an opportunity to do so at the liability stage of proceedings since *Keyes* had not been decided at that time. We find this suggestion utterly without merit. The effect of *Keyes* was before the district court during the trial on liability, it having been decided on June 21, 1973, a time when that trial had been reopened. The School Committee did not seek a reopening on the issues presented by *Keyes*; it described *Keyes* as a restatement of the principles of the earlier Supreme Court decisions. In any event, the district court found that the record was sufficiently complete to apply *Keyes*, 379 F. Supp. at 479, and that finding was not challenged on appeal.

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not required to reopen factual findings and legal conclusions reached after vigorous litigation — the whole point of which was to determine whether the segregation which concededly existed was caused by unconstitutional state action — and affirmed on appeal. *See, e.g., White* v. *Higgins,* 116 F.2d 312, 317-18 (1st Cir. 1940); *Bee Mach Co.* v. *Freeman,* 131 F.2d 190, 192-93 (1st Cir.), *aff'd,* 319 U.S. 448 (1943); *Hodgson* v. *Brookhaven Gen'l Hospital,* 470 F.2d 729 (5th Cir. 1972).

4. *The "White Flight" Controversy.*

The district court ruled that "white flight," defined as the departure of white children from the Boston city schools to parochial, private, or suburban school systems, is not a practicality for which the plan must make an accommodation. *Morgan* v. *Kerrigan,* 401 F. Supp. at 233-34. *See Davis, supra,* at 37. The Mayor and the Association challenge this ruling as an abuse of discretion, claiming that "white flight" alters the effectiveness of a desegregation plan and leads to "resegregation" of the schools.[27]

White flight is an expression of opposition by individuals in the community to desegregation of the school system. *Monroe, supra; Jackson* v. *Marvell School District No. 22,* 416 F.2d 380 (8th Cir. 1969); *Lee* v. *Macon County Board of Education,* 448 F.2d 746 (5th Cir. 1971). From the inception of school desegregation litigation, accommodation of opposition to desegregation by failing to implement a constitutionally necessary plan has been impermissible. *Brown* v. *Board of Education,* 349 U.S. 294 (1955) (*Brown II*).[28]

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[27] In the alternative, it is claimed that the district court should have taken white flight into account in modifying the masters' plan. *See* Part A 2, *supra.* The masters, however, rejected considerations of white flight in drafting their plan.

[28] "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300.

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Appellants contend, however, that white flight differs from other forms of opposition, because its effects, the withdrawal of white pupils from the school system, alter the effectiveness of the desegregation plan. The school system, they claim is "resegregated": the city school system largely black and other minority; the private and suburban systems, largely white.[29] To prevent this result,

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[29] Subsequent to the district court decision, we allowed to be filed, subject to a determination of relevance, voluminous affidavits and other materials by social scientists on the subject of white flight.

The admissibility of these submissions have been attacked as being outside the record, F.R.A.P. 10(a), and as hearsay. The materials have been defended as sociological data in the nature of "legislative facts" relevant to a determination of the law governing the district court in this matter.

For reasons we discuss in the text, we reject all these materials as irrelevant to the issues before us on this appeal. We include a brief synopsis of these materials to illustrate the difficulty in evaluating white flight if it were relevant.

The data submitted initially by the Association consists of an affidavit and report prepared by James S. Coleman, Professor of Sociology at the University of Chicago. Dr. Coleman states that his recent study shows that while there is decreasing segregation within school districts, segregation between school districts in the same metropolitan area is increasing; that rapid increase in loss of white children from central city schools follows immediately after school desegregation; and that as a consequence, desegregation has not significantly raised the levels of academic achievement of blacks.

Plaintiffs counter with the transcript of testimony by Jane R. Mercer, Associate Professor of Sociology, University of California at Riverside, in a case involving Indianapolis. Her testimony shows that she studied desegregation in school districts throughout the state of California; that white exit to private schools is a short term phenomenon; and that declines in white population in the cities are part of a long term demographic trend independent of desegregation. The plaintiffs also submit a paper written by Meyer Weinberg, Editor of *Integrated Education* magazine, which summarizes other studies showing white flight to be an avoidable phenomenon, not an inevitable consequence of mandatory desegregation. Weinberg's paper and another paper written by Professors Green of Michigan State University and Pettigrew of Harvard University, criticize Dr. Coleman's methodology, claiming that the source of his raw data is unknown; that failure to evaluate large

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appellants claim that the district court should consider white flight a "practicality", and limit the amount of

cities which have been subject to massive desegregation orders separately from large cities which have not been subject to court orders undermines the study's relevancy; and that failure to control for other variables, which may be correlated with white flight, jeopardizes the validity of his conclusions.

Dr. Coleman replies in an affidavit filed with a copy of a working paper, "Trends in School Segregation, 1968-73". In his affidavit, Dr. Coleman states that the report previously filed with the court was prepared for oral delivery and was based on the attached working paper. He defends his methodology, states that his conclusions are consistent with the findings of the studies cited by Weinberg, and the studies conducted by Dr. Mercer. Dr. Coleman states that his study shows that massive white flight will occur when there is a significant decrease in segregation in a city where there is a high proportion of blacks in the central city and suburbs of a significantly different racial composition.

Plaintiffs, in rebuttal, file another study prepared by Christine H. Rossell, of Boston University. The Rossell study, prepared from data on 86 northern school districts subject to court ordered or legislatively enacted school desegregation, suggests that white flight is minimal and a temporary reaction to school desegregation. Plaintiffs claim that Dr. Rossell's study differs from Dr. Coleman's in that Dr. Rossell deals only with northern school districts subject to desegregation plans while Dr. Coleman does not distinguish between forms of desegregation.

In the final submission, Dr. Coleman defends his study against the Rossell findings, suggesting that her analysis is inadequate to examine the effects of desegregation on a core city school system. He further claims that his model has proved accurately predictive of the Boston experience.

Throughout this series of submissions this court has been burdened with reports written for sociologists by sociologists utilizing sophisticated statistical and mathematical techniques. We lack the expertise to evaluate these studies on their merits. We do come to one conclusion, however. The relationship between white flight and court ordered desegregation is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged.

Appellants have also filed with this court copies of the Boston School Department's current census of students according to race and minority group. The figures facially suggest loss of a significant number of white enrollees. We note, however, that the district court is currently studying the accuracy of past enrollment data. We decline to make any conclusions concerning the existence or nonexistence of white flight on the sparse figures available to us.

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desegregation to that level which would enjoy acceptance in the white community.[30]

There are two endemic flaws in this argument. First, in the trial on liability, evidence was presented that feeder patterns, district lines, and open transfer policies were established for the purpose of satisfying purported white community desires. 379 F. Supp. at 438, 449. This evidence resulted in a finding that the Boston schools were administered in violation of the Fourteenth Amendment. Appellants now ask that the district court, in devising a remedy for these violations, respond in the same way as the Boston School Committee did to the same perceived community attitudes: draw district lines, assign pupils to schools, and limit racial mixture to reduce "white flight". In other words, while appellants dwell upon the unpleasant prospect of an inner city black school system

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[30] Appellants suggested approach would necessarily involve the district court in something like the following analysis: (1) take evidence concerning the prospects of white flight under the various plans proposed; (2) exclude the causes of such flight attributable to any historic trend, or such factors as overcrowding, transportation difficulties, deteriorated housing, taxes, crime, pollution, industrial migration, etc.; (3) make a judgment as to the effect which different levels of desegregation would have on white flight; and (4) select or devise that plan which will incorporate enough desegregation to bring about the maximum amount of inter-racial contact in the schools after taking account of the white flight such desegregation would be expected to induce.

The experts have difficulty in attempting to justify conclusions as to the effect of past desegregation plans on white flight, *see* note 29 *supra*; the task of making estimates of expected exodus of whites attributable to varying future desegregation plans would seem to be more difficult. Conceivably, public attitude sampling could be undertaken, using various hypotheses. This might involve questioning parents in a particular section or school district whether they would be likely to place their child elsewhere, or move, if the child were to attend a school which was x, y, or z percent black. The possibility is a real one that surveys would indicate that the prospect of any substantial amount of desegregation or busing would provoke sufficient expressions of intent to flee as to negate any desegregation plan. Alternatively, if expressed intentions were to be heavily discounted, their utility would accordingly diminish.

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surrounded by suburban white school systems, the prospect contemplated by their approach is that of an inner city segregated system, created unlawfully, but permitted to endure because the apprehension of massive white flight has made legal what had once been in violation of the constitution.

Second, appellants' claim that white flight destroys the effectiveness of the school desegregation plan, because of "resegregation" of the school system, founders on the constitutional definition of unlawful segregation. The Supreme Court has recently reemphasized that the constitutional right is to attend school in a unitary, nondiscriminatory, public school system. It is not to attend school in a system which is comprised of students of a racial balance which exists in the general geographical area. *Milliken* v. *Bradley,* 418 U.S. 717, 746 (1974). *Accord Calhoun* v. *Cook,* No. 74-2784, slip op. at 396 (5th Cir. Oct. 3, 1975); *Mapp* v. *Board of Education of Chattanooga,* Nos. 74-2100-01, slip op. at 3-6 (6th Cir. Oct. 20, 1975). What the layman calls "resegregation" is not constitutionally recognized segregation. It is racial isolation imposed by historic school district boundaries, *Milliken* v. *Bradley, supra,* or by individual choices to attend private institutions. *Compare McCrary* v. *Runyon,* 515 F.2d 1082 (4th Cir.), *cert. granted,* 44 U.S.L.W. 3279 (1975). This racial isolation becomes constitutionally significant only when the district boundaries are drawn with segregative intent, *Evans* v. *Buchanan,* 393 F. Supp. 428, 445-46 (D.C. Del.), *aff'd,* 44 U.S.L.W. 3295 (1975); *United States* v. *Missouri,* 515 F.2d 1365 (8th Cir.), *cert. denied,* 44 U.S.L.W. 3272 (1975); *see United States* v. *Scotland Neck Board of Education,* 407 U.S. 484 (1972), or when the state participates in the private institutions. *Norwood* v. *Harrison,* 413 U.S. 455, 463-65 (1973).

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The constitution cannot solve all problems. On the contrary, to the extent that it demands that rights which have previously been overriden be enforced, it creates social problems. It inconveniences, sometimes substantially, law enforcement officers, prison wardens, university administrators, and government bureaucrats. And, when it allows tasteless books to be sold or movies shown, many are offended. But expectable individual, official or group reaction does not outweigh constitutional rights. We therefore must agree with another court which said, "concern over 'white flight' . . . cannot become the higher value at the expense of rendering equal protection of the laws the lower value." *Mapp* v. *Board of Education of Chattanooga, supra, quoting* 366 F. Supp. 1257, 1260 (E.D. Tenn. 1973).

The bright note in this otherwise somber picture is the care and imagination that the district court has displayed in structuring a diversified educational system offering superior opportunities for children, both white and black. The plan is not a mechanical device to ensure that the races share equally, but serves its constitutional goals within a framework offering educational hope for the children of the city. Nevertheless, federal courts have a limited jurisdiction and competence. To the extent that reorienting the Boston school system involves social expenses, it must be paid for in coin less dear than the constitutional rights of the city's citizens. Here as elsewhere, the Boston community must look to other institutions, city, state, federal and private, to contribute to an effort to vindicate the constitutional rights of its citizens at a minimum of social cost.

B. *Detailed Challenges to the Court's Plan.*

The issues we have discussed above address the constitutional and statutory limitations on the court's power to issue a plan at variance with the Committee's or the masters' plan (Parts A 1 and 2) and to refuse, in tailoring

its plan to consider evidence of the precise impact of prior official segregative actions and of the extent to which its plan might cause the departure of white students from the school system (Parts A 3 and 4). We now consider a range of more specific objections to particular features of the plan and its method of implementation.

1. *Ratios and the Examination Schools.*

Appellants School Committee, Mayor and Association challenge the district court's use of racial percentage and quotas in several contexts: the guidelines for the composition of the schools in community school districts, the guidelines for the composition of citywide magnet schools, and the minimum percentage of black and Hispanic students mandated to be admitted to the elite, examination schools. Appellants claim that the district court's use of percentages was in violation of the Supreme Court's disapproval of fixed racial quotas in *Swann, supra.* We find that the district court resorted to percentages in an appropriate manner throughout.

The district court first ordered the overall racial composition to be used as a starting point in designing a school desegregation plan. This approach is specifically approved in *Swann.* In devising the court plan, community school districts were drawn to provide for a rough equality of racial composition among the districts to be desegregated.[31] Within each community school district, the

[31] Rough equality between districts was desirable to allow students from all the districts equal access to the citywide magnet schools without adversely affecting desegregation of the districts. The district court divided the school system into eight community districts and a ninth citywide district. The overall racial composition of the system for the 1975-76 school year was projected at 51% white (W), 49% black and other minority (B&OM). The projected enrollments in the seven community districts which would be desegregated ranged in racial composition from 61% W — 39% B&OM to 40% W — 60% B&OM. The eighth district, East Boston, was left predominantly white because of its isolated geographic location.

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court ordered that students should be assigned to particular schools so that each school's population approximates the composition of the community district. A deviation margin of ± 25 percent of the racial percentage figures was allowed to provide flexibility in planning. The desegregated schools in Boston, therefore, range between 30-70 percent white and 30-70 percent black and other minority under the plan.[32] This use of statistical ranges is consistent with other desegregation cases, *United States* v. *School District of Omaha,* slip op. 35-37 (8th Cir. June 12, 1975) (citywide school racial composition, 80% W-20% B; schools to be 0-35% B, 65-100% W); *Yarborough* v. *Hulbert-West Memphis School District No. 4,* 457 F.2d 333 (8th Cir. 1972) (citywide elementary schools 47% W-53% B; schools to be 30-70% W, 30-70% B), and does not establish racial quotas in contravention of *Swann.*

A more significant challenge is made to the guidelines for the composition of the citywide magnet schools. Each school is to limit its enrollment to fall within 5 percentage points of the citywide racial composition.[33] The district court found that a narrow range of enrollment ratios was permissible for schools in the citywide district because the practicalities to be accommodated, primarily geographic elsewhere in the system, were significantly smaller in the citywide district schools.

There are, moreover, substantial positive reasons for

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[32] In district 4, with a projected racial composition of 61% W — 39% B&OM, the permitted variance of the composition of the schools is 70% W — 30% B&OM. Because the percentage of black and other minority students cannot fall below 30% (39% — 25% (39) = 30%), the percentage of white students cannot rise above 70%. The same observation, in reverse, pertains to district 7, which is 40% W — 60% B&OM.

[33] Since citywide project composition was 51% W — 49% B&OM, magnet schools could permissibly enroll 56-46% W, 44-54% B&OM. The bilingual, bi-cultural magnet, Hernandez, was excepted from this requirement.

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enforcing a narrow range of permissible enrollments. The magnet schools were designed to maximize voluntary desegregation. Significant departures from the overall racial composition could cause the magnet schools to hinder rather than help the process of desegregation. First, attendance at the schools is voluntary. Few individual students will choose to attend a school which is predominantly of the other race. Second, the students attending the magnet schools come from the community school districts. If disproportionate numbers of one race transfer to the citywide school district, the racial composition of the community districts suffer. Fundamentally, the magnet schools, in order to prove of value to the desegregation plan, had to be carefully circumscribed to ensure that they would not serve as a haven for those seeking to attend a school predominantly composed of those of their own race.

Finally, appellants challenge the district court's order that at least 35 percent of the incoming class at the elite, examination schools be black or Hispanic as a racial quota. At face value, this directive does appear to establish a fixed racial balance for those classes at Boston Latin School, Boston Latin Academy, and Technical High School. But, once the schools are viewed as magnet schools, and as part of the citywide school district, the objection disappears. True, these schools are treated differently from the other magnet schools in that only the entering classes are desegregated, rather than the entire student body. This is to accommodate the cumulative nature of the instruction offered at these schools. For the entering classes, however, the district court's order provides that the racial composition shall be simliar to that of the other magnet schools: at least 41% black and other minority.[34] It is, therefore,

[34] The entering classes normally enroll 6-8% Asian-Americans. When these numbers are added to the black and Hispanic students, the percentage of the entering class which is characterized as black

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no more an impermissible racial quota than are the guidelines established for magnet schools generally.

There are, however, other, more fundamental challenges to the district court's treatment of the examination schools. The Association protests the schools' inclusion in the remedial plan since no specific segregative acts were proven in their administration. It also claims that a racial preference for admission is unconstitutional discrimination on the basis of race. The Mayor challenges the rejection of several alternative plans for the desegregation of the examination schools which would have imposed specific admissions criteria.

We start with the proposition that it is not unconstitutional per se for a city school system to operate an elite school even though low income or minority children may be under-represented in the student body, *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264, 1267 (9th Cir. 1974). The examination schools in Boston, however, are an integral part of a school system which has been found to be administered in an unconstitutional manner. They are presumed to be unlawfully segregated. *Keyes, supra.* As such, the examination schools must be part of the remedial plan. *See* Part A 3, *supra.*[35]

Several other plans for desegregation of the examination schools were presented to the district court. All relied on the Secondary School Admission Test (SSAT) to es-

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and other minority is in the range of 41-43%. As school officials testified that it would be difficult to find sufficient black and Hispanic students to satisfy the minimum figures, the district court apparently did not consider it necessary to place an upper limit on minority enrollment.

[35] This fact also disposes of the Association claim that imposing a racial preference at the examination schools is unconstitutional for those reasons expressed in Justice Douglas' dissent in *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974). Whatever the constitutionality of racial preferences in the absence of past unlawful discrimination, they are a basic tool in remedying constitutional violations. *See Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972).

tablish admissions criteria.[36] The district court found that the SSAT, although apparently of some predictive accuracy, had not been validated as a means of identifying students who can benefit from the examination schools' curricula. *Cf. Castro* v. *Beecher*, 459 F.2d 725, 732, 735-36 (1st Cir. 1972). Because of the limited amount of statistical data available, moreover, there was no assurance that any of these plans would admit a significant number of minority students. Given these factors, we find that the court acted within its discretion in rejecting the alternative plans.

The appellants claim that the district court's order will destroy the examination schools as elite academic institutions. If the order were inflexibly to require, for some years to come, the admission of blacks and Hispanics despite demonstrable underqualification by validated selection processes, we would hesitate to affirm. But the order is a temporary expedient, designed to ensure that the examination schools participate in the desegregation of Boston schools, pending development of racially neutral admissions criteria and the desegregation of the elementary schools. Advanced work classes at the elementary level which successfully feed students into the examination schools are being desegregated. Therefore, there is promise

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[36] The old method of selecting admittees to the schools was mandated by a consent decree between the School Committee and the Massachusetts Commission Against Discrimination (MCAD). This decree introduced the SSAT and admission was based solely on the scores of that test. As the plaintiffs were not parties to the MCAD litigation, the district court was not bound by the consent decree.

An alternative plan, proposed by the alumni associations of the affected schools, would have had 65% of admission based on the SSAT scores alone, the remaining 35% to be chosen in racial proportions but setting a score in the 50th percentile of the SSAT as a floor for admissions.

The masters' plan allowed for grade point averages as well as SSAT scores to be used, but adopted the use of a SSAT score floor.

that more minority students will become eligible for admission to the examination schools under any admissions standard.[37] The parties have been specifically invited by the court to develop admissions criteria which can be shown to identify accurately students who can benefit from the examination schools' programs. 401 F. Supp. at 244. *See Smuck* v. *Hobson*, 408 F.2d 175, 187-90 (D.C. Cir. 1969). We are convinced that the district court will monitor the progress of desegregation in the examination schools and will adjust its future orders to ensure the continued vitality of these schools as elite institutions. For the present, however, we affirm the court's treatment of the schools as within its discretion.

2. *Challenges to Composition of Masters' Panel Expert Dentler and to the Masters' Compensation.*

After the various desegregation plans had been submitted, the district court appointed two experts to assist it in evaluating the plans and also appointed a panel of four masters to consider the desegregation plans, hold evidentiary hearings, report to the court and recommend a desegregation plan. It also directed the city defendants; the School Committee, and the Superintendent of Schools, to pay the masters compensation of $200 per diem plus expenses. The School Committee objected to the appointment of three of the masters — Francis Keppel, Charles Willie, and Edward McCormack — and of one of the experts — Robert Dentler — on the grounds that their associations with the plaintiffs rendered them unqualified to serve.[38] These objections were overruled, and the

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[37] Appellants claim that only 25% of admittees come from advanced work classes. While it is obvious that the examination schools cannot be completely desegregated by the advanced work classes, desegregation of the classes is a positive step.

[38] The district court rested its decision on the qualifications of Master McCormack and Expert Dentler on the alternative ground that the School Committee's objections were not timely filed. The

masters and experts performed their assigned tasks. On May 2, 1975, the district court ordered the city defendants to pay the masters compensation of $21,906.13. The School Committee objected,[39] but its objection was overruled. The School Committee appeals the district court's rulings on the qualifications of the masters and expert and on the masters' compensation.

There is no merit to the School Committee's contention that the district court's failure to disqualify the masters and expert constituted reversible error. We observe, preliminarily, that the chance of error, if any, inflicting prejudice was remote. We have held that the masters' and district court's rejection of the School Committee's desegregation plan was constitutionally required. The masters' plan, while relied upon by the district court, was itself strengthened by the district court and thereby made less acceptable to the School Committee. Moreover, the impartiality of the masters is suggested by their criticism and rejection of the plaintiffs' plan. Thus, any error would seem to us to have been rendered harmless. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 148 (4th Cir. 1970), *rev'd on other grounds*, 402 U.S. 1 (1971). We need not rest our decision on this basis since we agree that there were no grounds for disqualifying any of the masters or experts.

The basis for the School Committee's objections to Masters Keppel and Willie is that they have been associated with the Harvard University Graduate School of Education and thus are indirectly related to the Harvard Center

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objection to the qualifications of these individuals took the form of a motion to expunge filed on March 4, 1975, more than a week after the masters' hearings concluded and almost a month after the February 6 deadline for filing objections. Since we hold that the district court did not err in its ruling on the merits, we need not reach this point.

[39] We need not express an opinion on the timeliness of this objection in the light of our holding on the merits.

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for Law and Education, three of whose staff attorneys have helped represent the plaintiffs in this case. The ground for the objection to Master McCormack and Expert Dentler is that they have supported the NAACP which, although not a party, supports the plaintiffs' suit, has advanced funds to cover disbursements, and has permitted its General Counsel to serve as one of plaintiffs' counsel. The relationships of these individuals to the plaintiffs' counsel are attenuated. Master Keppel was Dean of the Graduate School of Education until 1962 and Master Willie has been a member of the faculty there since 1974.[40] The Harvard Center for Law and Education, which was founded in 1969, is completely independent of the Graduate School of Education. Although it is housed in the Graduate School, it is funded by the federal government and pays the Graduate School for space and services. We fail to see how a relationship with the Graduate School could give rise to a reasonable inference of possible bias in favor of the plaintiffs with respect to the scope of the desegregation remedy in this case. We reach a similar conclusion with respect to the other master and expert. Expert Dentler has been a member of the NAACP in the past, but could not remember whether he paid his dues for 1975. Master McCormack became a life member in 1960. Although these relationships suggest general agreement with the goals of the NAACP, they hardly provide a reasonable basis for concluding that those individuals would be biased in the plaintiffs' favor with respect to the breadth of the desegregation remedy. We note, moreover, that several of these individuals have

[40] On appeal, the School Committee suggests that it was improper for the district court, in considering the School Committee's objections, to rely upon interviews with Masters Keppel and Willie and upon representations of plaintiffs' counsel. It is clear from the record, however, that the School Committee acquiesced in this method of investigation.

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relationships with the School Committee which might, to an equal extent, suggest bias in the School Committee's favor.[41]

Since masters and experts are subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters, masters and experts have not been held to the strict standards of impartiality that are applied to judges. *See United States* v. *Certain Parcels of Land,* 384 F.2d 677, 681 (4th Cir. 1967); *Scott* v. *Spangler Bros., Inc.,* 298 F.2d 928, 931 (2d Cir. 1962). *Cf.* 28 U.S.C. §§ 144, 455. Here, we doubt that, even under the strict standards applied to judges, the district court erred. Motions to disqualify judges have frequently been denied even in cases far stronger than this case. *See, e.g., McNeil Bros. Co.* v. *Cohen,* 264 F.2d 186, 188-89 (1st Cir. 1959); *Eisler* v. *United States,* 170 F.2d 273, 278 (D.C. Cir. 1948); *Darlington* v. *Studebaker-Packard Corp.,* 261 F.2d 903, 906 (7th Cir. 1959); *Weiss* v. *Hunna,* 312 F.2d 711, 714 (2d Cir. 1963). We conclude that these individuals were qualified under the more relaxed standards that are applied to masters and experts.

The School Committee's challenge to the order that it pay the masters' compensation is also without merit. The district court has broad discretion in fixing the amount of such compensation and in determining which of the parties to charge. F.R.Civ.P. 53(a). Here there is no basis for concluding that the district court abused its discretion. The grounds for the School Committee's objection is its belief that the reference to the masters was unnecessary and unwise and that the masters expended a great deal

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[41] The Harvard Graduate School of Education has, on several occasions, been hired by the School Committee to conduct surveys. Expert Dentler, in his capacity as Dean of Boston University's School of Education, has done work for the Committee. Thus, three of the four individuals challenged have benefited financially from their relationships with the School Committee.

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of time and energy fruitlessly. Assuming arguendo that these allegations would constitute grounds for setting aside the district court's order, we note that the district court reasonably reached contrary conclusions regarding the necessity and utility of the masters' work. We hold that there was no abuse of discretion.

3. *Alleged Encroachment on School Committee Functions.*

To effectuate its plan in this case, the district court adopted what it called a "multiplicity of measures" beyond the mechanical redistribution of students. The broad purpose of these measures, as articulated in the opinion below, was effective implementation of equal educational opportunity through banning active discrimination, meeting the persisting effects of past discrimination, and alleviating the difficulties of transition to a desegregated situation. The School Committee concedes these are proper goals, but objects to some specific measures as encroachments on its traditional powers and functions. Although we discuss the challenged provisions individually below, the greatest justification of each, in our view, is common to all.

The overriding fact of the matter is that the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay. *See generally* Part II of the opinion below; on previous Committee resistance to state desegregative efforts, *see* 379 F. Supp. at 418-21, 429-32, 438-41, 451-56, and 477. The most visible recent example of such conduct was their refusal to authorize submission to the court of the desegregation plan drawn up by the Committee staff, an action which provided the basis for subsequent contempt convictions; upon the rather lenient purging of those convictions, they then submitted a freedom of choice

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plan which they knew was inadequate. And they did not hesitate to manifest directly to the court their unwillingness to cooperate with the effort to desegregate the Boston schools. The court addressed interrogatories to the Committee members late in December, 1974, relative to their willingness to promote the peaceful implementation of the Phase I interim plan in effect during 1974-75. The then Chairman responded: "I will continue to obey lawful orders of the Court, but I will take no initiative or affirmative action to advocate or supplement this plan . . . ." Similar responses were made with respect to the future promulgation of a court-developed plan. In short, the obstruction by the School Committee was substantial and the district court had every reason to believe it would continue. This crucial fact justifies, in our opinion, a number of extraordinary measures which might otherwise be open to question.

a. *Specifying magnet programs.*

The School Committee does not object to the concept of magnet schools; indeed, Boston has had a number of such schools for many years. The Committee's plan retained these, and proposed a total of about 50 magnet programs, more than twice as many as the court's plan provided for.[42] The narrow objection under this heading is to the veloped at several of those schools.[43]

The magnet schools play a central part in the court's desegregation scheme. The citywide school district contains

[42] The experts and masters felt this number would so saturate the city as to deny the magnet schools a desegregative effect, their raison d'etre. *See* note 10, *supra.*

court's specification of the particular programs to be de-

[43] The court's plan left intact the programs of those citywide schools which had established themselves over the years as magnets, and it apparently adopted a number of the magnet programs as proposed in the Committee plan. The Committee's appeal is addressed only to five or six instances where it is felt that the court's plan is inconsistent with its own proposals.

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an unusually high number of these facilities meant to attract students from all over the city to specific distinctive programs that appeal to them. If successful, this desegregative tool will stimulate substantial voluntary student transportation, reducing forced busing; and 20 U.S.C. § 1713(f) required the court to look to magnet schools before resorting to mandatory transportation beyond the next nearest school. Implicit in the power to use magnet schools, at least upon the default of the School Committee, is the power to specify programs essential to make them magnetic. In this case, that power was more crucial because of the importance of the magnet schools to the plan being implemented.

We do not find in the record below any School Committee objection to the court's power to order programs, or to the specific programs required. Nor do we see any indication that the district court would be unreceptive to any equally attractive programs which the School Committee might desire to substitute for those provided for in the court's plan. Good faith cooperation by the Committee would appear to be all that is required.

b. *The contracts with colleges and universities.*

As part of its effort to provide magnet programs that would be distinctive and attractive enough to work, and more generally to equalize educational opportunity, the court enlisted the aid of a number of area colleges and universities, each to participate in the development of programs at specific schools. The court ordered the school department to "use its best efforts to negotiate a contract pertaining to each paired school acceptable to both the School Committee, and the contracting institution of higher learning." 401 F. Supp. at 247. The court refrained from specifying any of the op. at 84. The court refrained from specifying any of the terms of these contracts, except to note that the institutions should not "usurp or replace the

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proper role of the School Department or any of its employees . . . ." The state defendants, which have advanced $900,000 and are likely to absorb much of the future cost of his project, *see* Mass. G.L. c. 71, § 371; c. 15, § 1I, and 401 F. Supp. at 246, and the Boston Teachers Union support this aspect of the court's order; but the school Committee charges that it enters the area of quality of education, and is thereby outside the court's authority.

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has a broad power to fashion a remedy that will assure a unitary school system." *Swann, supra,* 402 U.S. at 16. The magnet schools were a central part of the court's remedy, but to accomplish their purpose they had to be both well conceived and implemented in good faith. The School Committee takes out of context remarks of the court that assistance of the colleges would improve the quality of education in the system and "wonders how the issue of quality of education arose". This argument — that the court has no legitimate function to improve quality — entirely misses the point that if magnet schools are to act as lodestones, drawing students voluntarily or their programs, quality is a key to this aspect of a plan of desegregation. And the court had been led in the clearest terms to understand that the Committee would do only what it was ordered to do. Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised, but the supervision of compliance in this area, as opposed to student assignment for example, would have been extraordinarily complex and might well have drawn the court into purely educational decisions. Paradoxically, therefore, the resort to outside contracting may have an effect precisely the opposite to that alleged by the appellants. In ordering the contract talks, the court removed itself from the content of educational decisions

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as much as possible by mandating best efforts negotiation rather than any specific provisions. In the context of this case, that order amounted to the most reliable and least intrusive method of ensuring that the School Committee would act to implement the magnet school provisions, which in turn were important to make the remedial plan work.

This provision of the order, being innovative, it without precise precedent in other cases. But in light of the background of the case and the particular objective being served, we hold the best efforts provisions to be within the equitable discretion of the court.

c. *The citywide and community councils.*

The Citywide Coordinating Council and Community District Advisory Councils were established to monitor implementation on behalf of the court. The CCC was also charged with trying to identify and resolve problems, but was explicitly not authorized to "co-manage or make policies for the Boston schools."[44] Citizen participation in the desegregation process was embodied in the Community District Advisory Councils, drawn largely from the unobjected-to-racial-ethnic parents' and students' councils established the previous year. Such groups have been approved in many cases, *e.g., Dowell* v. *Board of Education,* 465 F.2d 1012, 1015-16 (10th Cir. 1972); *Singleton* v. *Jackson Municipal Separate School District,* 426 F.2d 1364, 1370 (5th Cir. 1970).

The challenge to these provisions asserts that they involve more than mere monitoring. The Committee objects that the CCC's duties of attempting to resolve problems and of offering advice to the school department infringe on the Committee's power to have general charge of the schools. As we view the mandate, however, no substantive

[44] The city defendants, charged with paying the costs, have not objected to these councils.

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power was accorded to the CCC and CDACs. Apart from the invaluable function of clustering groups of different generations and races in an attempt to promote citizenship understanding and support, the monitoring process is a basic responsibility of the court. To the extent that the myriad of minor problems which will arise can be resolved without the necessity of resorting to the district judge, the process of implementation will be facilitated.

The Committee objects that the CCC was instructed "to support efforts to improve the quality of education." Attention to educational programs from the perspectives of banning active discrimination, assuring equal educational opportunity, meeting the effects of past discrimination, and alleviating the transition to desegregation is obviously a proper goal needing no justification. While better quality education as a general goal is beyond the proper concern of a desegregation court, we do not view the court's instructions to be divorced from its efforts to devise an effective plan of desegregation.

d. *Additional supervisory personnel.*

Since the court's plan established three more districts than had previously existed, it required three more district superintendents to be hired. This requirement is contested, but not vigorously. The more major objection is to the court's order that each elementary school be headed by an administrator of the rank of headmaster or principal.

If these provisions were reasonable, both were within the power of the district court. The equalization of educational opportunity through the implementation of the desegregation remedy at the schools requires effective administration. Similar orders have been upheld routinely. *See Davis* v. *School District of City of Pontiac,* 487 F.2d 890 (6th Cir. 1973); *Plaquemines Parish School Board* v. *United States,* 415 F.2d 817, 821 n. 2 (5th Cir. 1969). But

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the Committee (joined in this point by the Mayor), argues that the order as to elementary school administration was arbitrary and unreasonable, and therefore an abuse of discretion. The elementary schools previously were joined in multi-school districts headed by district principals. With the dissolution of these multi-school units, a number of which the district court had found to be segregated within themselves, 379 F. Supp. at 437, over 100 elementary schools exist under the court's plan, including six with a capacity between 100 and 180 students. The School Committee charges that the court's order would require 80 new principals; the Mayor, perhaps partly because he concedes the need for principals in each elementary school housing more than 1,000 pupils, places the figure at 53.

This argument is not addressed to the proposition that each school should be under the supervisory responsibility of one person but to the implication of the court's order, which refers to "rank of principal or headmaster", that the smallest of schools shall be headed by a person commanding the same grade level and pay as a person who supervises the largest. Subsequent to the court's order, we are informed, the court stated that its intent was simply that there be a "person in charge" of each facility; the level of compensation was left to the School Department and Committee. This seems to us the sensible approach. The district court having clarified the meaning of its order, we see no reason at this juncture to set it aside, but leave the matter to be worked out by the school authorities to the satisfaction of the district court.

e. *The power given to the experts.*

The Committee objects to three orders of the court with respect of its experts.

The May 10 order promulgating the court-developed desegregation plan provided that the assignment of students be carried out "under the supervision of representatives

of the court". The memorandum of decision on June 5 stated: "The nature of instruction given in the schools must also receive the attention of the court and its representatives. Instruction must be non-discriminatory and avoid racial stereotyping." 401 F. Supp. at 234. We see nothing unusual in these orders. Experts are commonly used to assist the court in planning desegregation, *see generally Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), and under the circumstances of this case were justifiably used to assure implementation as well. It is regrettable that there was a need to closely monitor the assignment process, but it is the Committee's own doing. To have neglected it, or to have failed to assure that instruction was non-discriminatory would have been irresponsible of the court.

The June 20 order was a response to a delayed School Committee proposal about certain of the guidelines which needed to be settled before the student assignment process could begin. The proposal conflicted substantively with the court's previous orders in several respects, and advanced positions which (also contrary to court orders) had not been discussed with the court's experts. Operating under serious time pressure to effectuate the desegregation plan smoothly for the fall, the court "authorized the court-appointed experts to resolve forthwith the remaninig issues with respect to facilities utilization, program allocation and enrollment units. The court will as soon as feasible review with the court-appointed experts their determination of these remaining issues . . . ." While this order perhaps gave the experts an unusual, if brief, amount of power, it was justified by the School Committee's actual violations of the court's substantive and procedural orders, and its unwarranted delay in the face of the urgent necessity of finalizing these decisions. The court specifically

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found that absent this order "the student assignment process would be stalled and the implementation of the May 10 plan be jeopardized." Along with the provisions for immediate court review, this order was proper under the circumstances.

Moreover, all of the duties specifically provided for in these three orders having now been substantially performed, the only active controversy remaining under this heading probably is the continued existence of the experts themselves. The Committee urges that their function is completed, and that they "should now return to their university." We agree that this will be appropriate once a unitary school system has been established, and perhaps even earlier in the court's discretion. The speed with which this goal is accomplished, however, rests in large measure in the hands of the Committee itself. We note that a new Committee was elected in November; it is our hope that the new majority will be more constructive than the old. If so, the court measures discussed in this section, many of them undoubtedly aggravating, may cease to be necessary.

* * * *

We therefore affirm the District Court's plan and implementation order for Phase II.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1184

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellees,

BOSTON HOME AND SCHOOL ASSOCIATION,
Defendant-Intervenor, Appellant.

No. 75-1194

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellants.

No. 75-1197

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellants.

No. 75-1212

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellees,

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KEVIN H. WHITE ETC., ET AL.,
Defendants, Appellants.

JUDGMENT

Entered January 14, 1976

This cause came on to be heard on appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court entered May 2, May 10, and June 5, 1975, are affirmed.

The plaintiffs and the Massachusetts Board of Education are to submit statements of costs for reproducing their respective briefs, and all parties are to submit statements for their respective costs, if any, for reproducing the appendix.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Moloney, Fremont-Smith, Wise, Connolly, Leubsdorf, Hiller]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-911-G

TALLULAH MORGAN ET AL.,
Plaintiffs,
v.
JOHN J. KERRIGAN ET AL.,
Defendants.

MEMORANDUM OF DECISION
AND
REMEDIAL ORDERS

GARRITY, J.
June 5, 1975

MEMORANDUM OF DECISION AND REMEDIAL ORDERS

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* Part V was filed separately on May 10, 1975; it has its own table of contents and pagination.

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I

Introduction[1]

Boston has been a magnet for people searching for access to the larger American society ever since the founding of the nation. Boston's magnetism has, in recent decades, attracted thousands of black Americans, Hispanic Americans, and Oriental Americans into its midst. Like those who preceded them from Europe, these Americans are being pushed by the hardships of their present life and pulled by the promise of opportunities that Boston has always represented.

Many Bostonians today face a different situation from the one faced by settlers in earlier generations, however. Many of today's Bostonians, white, black, and other minorities, must bridge a cultural gap far wider than the one bridged by their predecessors.

Hard as the bridge to opportunity was to travel for most Bostonians from 1800 to 1946 the bridge did exist. Growing industries were in search of workers. The physical structure of Boston permitted the incoming ethnic groups, albeit after much struggle, to settle in enclaves within a city that was not yet over-built. Of equal importance, free public schools served as an open road across the gulf between the old cultures and the new. Public schools also provided, through their instruction, access to semi-skilled and skilled occupations.

Building upon a foundation laid in the colonial era, Boston became the bridge not only to liberty but to the ideal of the free, universal, and inclusive public school. Horace Mann established in 1837 the nation's first statewide education commission. In that decade, he achieved world wide renown as the Father of the Common School. Under his stimulus, Boston erected the Quincy School, still

[1] This introduction has been taken almost verbatim from the report of the masters filed March 31, 1975.

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in use today in Boston, as the nation's first multi-classroom public elementary school. Built in 1847, the Quincy School expressed in brick and mortar as well as program all that was ideal, urban, and progressive in the nineteenth century vision of the Common School.

Horace Mann's vision served the children and youth of Boston for more than a century. But, as the deterioration and segregation of the Quincy School make plain to the eye of any visitor, that vision began to dim after World War II. Public schools and school services became increasingly unequal in quality. Some became exclusive rather than inclusive of all groups.

Ethnic segregation, cultural isolation, overcrowding some schools and extreme underutilization in others, incoherent grade structures, discriminatory assignments and school admissions procedures, all combined to guarantee unequal and inferior educational opportunities for the children of Boston. By the late 1960's conditions had become so deplorable that one responsible investigator reported,

> Of any generation of seventh graders, 85 percent *do not* complete four years of college; 75 percent do not even begin college. In any ghetto area, more than half never finish high school.[2]

As the public schools of Boston declined, they also became outmoded. Speaking of them, the Harrington Report concluded, "Course offerings available to most public school students today are similar to those in the schools of their parents and grandparents."[3] In the last few years, the Boston School Department has worked to introduce some innovations and improvements, but these have been handicapped by maneuvers to maintain segregation.

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[2] Peter Schrag, *Village School Downtown*, (1967).
[3] Willis-Harrington Commission.

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This demise over a period of three decades took place alongside the rising hunger of Bostonians for schools that could help them bridge the gap between ethnic isolation and access to the larger and ever more complex urban society. The children of second and third generation white ethnic families suffered as the schools located within their residential enclaves came to reinforce rather than reduce the educational distance between their neighborhood and access to the larger society. Black and other minority children, meanwhile, suffered even greater educational deprivations as the schools they attended were the most crowded, the oldest, the least well maintained, and the most poorly staffed that the school committee could offer.

In the court's quest for a remedy adequate to reviving the vision of an equitable and effective public school system, it has planned for schools that will be free, universal, inclusive, and sound in ways that meet the educational needs and aspirations of all of Boston's citizens. It believes that the reconstruction of the ideal of the Common School requires a common concern with equality and excellence throughout all institutions and groups in the entire Greater Boston area.

While it has obligated the Boston School Committee and its Department to eliminate segregation and the effects of discrimination in the public schools, it has also solicited the talent, support, and assistance of colleges, universities, and business and ther organizations in developing learning opportunities that will remedy the losses students have already suffered and that will lay a basis for improving the quality of education for the total City.

II

Prior Proceedings

On June 21, 1974 the court issued an opinion holding that Boston's public schools had been unconstitutionally

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segregated by the purposeful actions of the school committee and superintendent. *Morgan* v. *Hennigan,* D. Mass. 1974, 379 F. Supp. 410. This finding was affirmed by the Court of Appeals in December of 1974. *Morgan* v. *Kerrigan,* 1 Cir. 1974, 509 F.2d 580. The finding was based on a history of school committee actions and inactions spanning a decade, involving overcrowding and underutilization of facilities, placement of portable classrooms, use of new facilities, districting, feeder patterns, open enrollment policies, and hiring and assignment of faculty and staff, which intentionally brought about and maintained a dual school system in Boston. In 1971-72 the system contained 59,300 whites (61%) and 30,600 blacks (32%), yet only five of 140 elementary schools had a racial composition that came within 10% of the citywide ratio. Eighty-four percent of white students in Boston attended schools more than 80% white; 62% of black students attended schools more than 70% black. 379 F. Supp. at 424. Added to the background of this case were efforts by the school committee beginning in 1965 to evade the effects of the Racial Imbalance Act passed by the Massachusetts legislature. Mass. G.L. c. 71, §§ 37C and 37D, and c. 15, §§ 1I, 1J and 1K. Following an unsuccessful attack by the Boston School Committee on the constitutionality of the statute, a series of orders of the State Board of Education and judicial proceedings in state courts culminated in orders from the Supreme Judicial Court that the school committee implement in the 1974-75 school year a plan formulated by the State Board of Education (the "state plan").

In the court's opinion of June 21, 1974 the defendants Boston School Committee and Superintendent (the "city defendants") were found to have "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and to have

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intentionally brought about and maintained a dual school system." 379 F. Supp. 410, 482. The court ordered these defendants to "begin forthwith the formulation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants." 379 F. Supp. at 484. As an interlocutory order, the court enjoined the defendant school committee and superintendent from failing to comply with the state plan.

In July 1974 the school committee and superintendent, dissatisfied with the state plan, requested time in which to prepare a substantive plan which would accomplish desegregation in two stages, secondary schools in September 1974 and elementary schools in September 1975. The court granted time until July 29. At the end of this period, the defendants reported that they had been unable to develop a satisfactory substitute for the state plan, and the efforts of the court and parties turned to the implementation of the state plan. The state plan is only a partial plan in terms of the constitutional requirements of this case. Drawn under constraints of state law regarding assignments, it sought to decrease the number of racially imbalanced schools, i.e., having a majority of non-white students, from 68 to 44. It left large areas of the city such as Charlestown and East Boston unaffected and permitted the continuation of a number of virtually all black middle and elementary schools.

The opening of school under the state plan in September of 1974 was accompanied by some violence and much fear. School buses were stoned, their windows broken and some children cut by shattered glass. Angry crowds of white parents and students gathered in front of schools to protest the entry of black students assigned there. Student boycotts of varying effectiveness were organized.

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Many students stayed home or were kept home by their parents out of fear for their personal safety. Several city high schools were the scenes of racially-connected fights and incidents. As the school year continued, violence subsided, then recurred. The court and the parties took several steps in an effort to provide security and reduce racial tensions. Racial-ethnic councils of parents and students were established. In October federal marshals were requested by the Mayor, but it developed that such assistance was available at the federal level only after city and state resources were exhausted. State troopers joined city police in large numbers in troubled areas, such as predominantly white South Boston and Hyde Park. Even today 166 state and local police officers are stationed in the halls of South Boston High School and another 134 are stationed in the vicinity during school hours. In December a white student was stabbed inside South Boston High School by a black student. Community residents gathered and surrounded the high school building, trapping black students inside until a decoy operation by police permitted the departure of the black students. In the aftermath of this incident, all schools in the South Boston-Roxbury district were closed early for the Christmas vacation and reopened late, and then only against advice of city and state police officials who urged the permanent closing of South Boston High. The court issued orders designed to keep crowds from gathering along bus routes and around school buildings, and to keep non-students out of school buildings during class hours. The student code of discipline was amended to prohibit the use of racial epithets to antagonize others. The parties developed alternative plans for students at South Boston High should its permanent closing have become necessary. A monitoring program was developed by the Community Relations Service of the United States Department

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of Justice, under which volunteers have been stationed in troubled schools to watch for signs of increasing tension.

In many schools this year the atmosphere has been one of felt tension, where the educational process has suffered. In others, notably at the middle and elementary school levels, but also at some high schools, students and teachers have gone about the business of learning and have developed integrated learning programs of which they are proud.

As these events were occurring, planning was renewed for the development of a citywide desegregation plan to be implemented in September 1975. After several hearings on proposals of the parties as to its terms, the court entered an order on October 31, 1974 establishing the filing date and general contents of a student desegregation plan to be filed by the defendants. This order required the filing of progress reports on the development of the plan and filing of the plan itself by December 16, 1974. It also stated that "the plan shall be approved by vote of the defendant school committee before submission to the court." In setting standards for the plan, the court said:

> Taking into account the safety of students and the practicalities of the situation, the student desegregation plan shall provide for the greatest possible degree of actual desegregation of all grades in all schools in all parts of the city. In drafting the plan, the defendants shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate and secondary, throughout the system.

The order provided that parties and other interested community groups would have until January 20, 1975 to file

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criticisms of the school committee plan or to file alternative plans.

Progress reports were duly filed by the defendants, but on the deadline for filing its plan, December 16, the school committee by a three to two vote refused to approve for filing with the court the plan developed by the school department at the school committee's direction and about which the progress reports had been made. Counsel for the defendants filed the plan (known as "the December 16 plan") despite the school committee vote, then asked the court's permission, granted when new counsel was later obtained, to withdraw from the case.

Plaintiffs filed motions that the three members of the school committee voting against submission of the December 16 plan be held in criminal and civil contempt. In preparation for the hearing on these motions, the court required written answers from these three school committee members to questions about their willingness to obey future orders of the court and their willingness to take affirmative steps to decrease racial tensions and peacefully implement the state plan. In every case the members stated that they would obey orders by the court but would take on other steps except where they deemed actions would reduce racial antagonism and provide adequate safety for the school children. The questions and the then chairman Kerrigan's answers, which were typical, appear as Appendix A. At hearing on the contempt motions the members testified that their votes had been based on conscientious opposition to any form of "forced busing," i.e., assignments to schools beyond walking distance, which made them unable to endorse any desegregation plan containing forced busing. This view was adhered to even though there might be no desegregation without mandatory busing. The then chairman Kerrigan testified as follows:

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> I certainly am against the forced busing of school children. I have always been against the forced busing of school children. I ran for office stating that I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists, the way the housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing.
>
> I certainly could go for magnet schools. I certainly could go for an increase in the METCO program. I could go for any plan that would give the parents whom I represent a choice of the school. I can't vote for a plan that includes the forced busing of school children. The hypocrisy in that statement is there is no way that it can be done without the forced busing of children.

The court denied the motions for criminal contempt but held the three committeemen in civil contempt of the October 31 order. In order to continue the planning process, however, the court directed the parties to file critiques and alternatives to the December 16 plan, unsponsored though it was. On December 30 the court outlined sanctions to begin January 9, 1975 which could be avoided or purged by a vote to authorize the submission of a student desegregation plan. On January 7, after applications for a stay of sanctions were denied by this court and by the Court of Appeals, the school committee voted to direct the school department to draw up a desegregation plan without forced busing and to authorize the submission to the court of that plan. The court found that the three committeemen had thereby purged themselves of civil contempt provided the plan was authorized and filed by January 20, later extended to January 27. The school committee did authorize and file a plan on January 27.

An alternative plan was filed on January 20 by the

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plaintiffs, along with criticisms of the December 16 plan by parties including the state defendants, the Mayor and Public Facilities Department, the Boston Teachers Union, as well as numerous community groups and individuals. El Comite de Padres Pro Defensa de la Educacion Bilingue (hereinafter referred to as "El Comite") was permitted to intervene on behalf of the Hispanic children and parents and also filed comments on the various submissions. The parties then filed comments on each other's submissions to clarify points of disagreement.

The Home and Social Association, comprising chapters of parents, was permitted to interevene on the question of the student desegregation remedy and filed a plan and supporting memoranda which the court treated as a motion to modify its October 31 order. The association attempted to show that certain segregated schools had not been affected by defendants' actions and therefore were not required to be desegregated in formulating a remedy. The association argued that even within an admittedly dual school system, the remedy should reach only those schools in the system as to which specific findings as to the effect of segregative actions had been made. The court held a separate hearing on February 5, rejected the association's motion and refused to allow further consideration of its plan.

The court determined that because of the complexity and multiplicity of the school desegregation plans and proposals filed, the use of a panel of masters to hold evidentiary hearings and make recommendations on a desegregation plan to the court was advisable. On January 31, the court appointed two experts, Dr. Robert A. Dentler, Dean of the Boston University School of Education, and Dr. Marvin B. Scott, Associate Dean of the same school, to assist the masters and the court in the task of adopting a student desegregation plan for September 1975.

In an order on February 7, the court formally appointed a panel of four masters (they had been designated on February 5 to allow parties to object to their identity and to terms of the proposed order of reference): retired Supreme Judicial Court Justice Jacob J. Spiegel, who presided at the hearings; former United States Commissioner of Education Francis Keppel; former state Attorney General Edward J. McCormack, Jr.; and Professor of Education at Harvard University Dr. Charles V. Willie. The masters held two weeks of evidentiary hearings, beginning February 10. On March 31, after having heard the parties' comments on their draft report, the masters filed their final report with the court which recommended a plan prepared by them incorporating elements of the plans submitted by the parties and proposals of their own. The parties then filed objections to the masters' report. After hearings on these objections, and on objections to modifications proposed by the court after examination by its experts of updated data furnished on April 10 by the school department, the court decided upon the modified version of the plan recommended by the masters which is established by the remedial orders herein promulgated.

III

Findings and Conclusions

The findings of fact and conclusions of law that follow constitute many but by no means all of the factual and legal underpinnings of the court's student desegregation plan and related remedial orders. Numerous findings descriptive of the Boston public school system, its facilities, student body, curriculum, administration and the like, appear in the plan itself. Also, the transcripts of several hearings in open court on the remedial aspects of the case contain many oral findings and rulings by the court which are pertinent. This memorandum of decision deals mainly with the reasons for particular features of

the desegregation plan that have been of major concern to the parties.

A.

Plans Submitted by Parties

The plan submitted by the school committee on January 27, 1975 was constitutionally inadequate because it did not promise realistically to desegregate the public schools. It proposed a phased assignment process based on choices by parents and students among a series of options. The assignment process would require a period of up to seven weeks and up to five communications between the school department and the individual parent or student who would be allowed but one week in which to respond to each communication. Magnet programs in citywide and zonal schools would be open on a desegregated basis only, but the ultimate composition of the majority of schools in a zone would be determined by parental choice. For schools which remained "racially isolated", defined by the school department as more than 15% beyond the racial ratio of the zone at that level, as a result of parent and student choices, the plan provided for mandatory participation of students at those schools at desegregated "third-site Resource Centers" one day a week for elementary schools and one day every two weeks for middle schools.

As pointed out by the masters, any plan that places complete reliance on parental choice to desegregate Boston's schools cannot be constitutionally adopted. Such plans must be rejected where, as here, there are more effective methods of desegregation reasonably available. *Green* v. *School Board of New Kent County,* 1968, 391 U.S. 430. Complete freedom-of-choice plans have a long history of failing in many cases when adopted to result in desegregation. E.g., *Green* v. *School Board of New Kent County, supra; Monroe* v. *Board of Commissioners,* 1968, 391 U.S. 450; *Hall* v. *St. Helena Parish School Bd.,* 5 Cir. 1969,

417 F.2d 801; *United States* v. *Jefferson County Board of Education*, 5 Cir. 1969, 417 F.2d 834.

We need not rely on experience elsewhere, however, to predict the ineffectiveness of such a plan in Boston. Boston's own experience with open enrollments, feeder patterns and options, and the opening of the Hennigan and Lee schools, set out in detail in the court's June 21 opinion, *Morgan* v. *Hennigan, supra,* at 430-441-56, shows the segregative effects that have occurred under such options in Boston and which in all likelihood would occur again if the school committee plan were to be adopted.

Certainly there have been some magnet programs in Boston, such as the model demonstration subsystem elementary program at the Trotter School, that have achieved integrated enrollments through volunteer applications. To the extent that desegregation in Boston can be achieved on a voluntary basis, the court endorses the concept and incorporates it into the plan adopted. But to disregard the history of desegregation efforts throughout the country and in Boston as the school committee urges we do by adopting its proposal on a trial basis would be to place the realization of the rights of Boston's black students in a vessel that would begin its voyage rudderless against the wind.

The addition of "third-site resource center" experiences does not save the school committee plan from its otherwise total and therefore unacceptable reliance on voluntary choices to produce desegregation. An integrated experience is no substitute for a desegregated education. The court agrees with Judge Doyle in Denver, who stated, when faced with a similar proposal,

> The special education programs which are suggested involving the enrichment offerings together with the open school concept and the special programs designed for use in segregated schools are desirable, but the

> emphasis is on enriched education and can scarcely be considered a plan for desegregation. Thus, the transporting of students from concentrated schools to enrichment centers for three weeks on a half day basis to intermingle with other ethnic groups while engaging in special programs does not pretend to be a desegregation plan. It impresses us, on the contrary, as a plan which is more designed to avoid adoption of a desegregation plan.

Keyes v. *School District No. 1, Denver*, D. Colo. 1974, 380 F. Supp. 673, 682. See also, *United States* v. *Texas Educ. Agency*, 5 Cir. 1972, 467 F.2d 848; *United States* v. *Board of Educ. of Webster County*, 5 Cir. 1970, 431 F.2d 59; *Dowell* v. *Board of Educ. of Oklahoma City*, W.D. Okla. 1972, 338 F. Supp. 1256, aff'd, 10 Cir. 1972, 465 F.2d 1012, cert. denied, 409 U.S. 1041; *Spangler* v. *Pasadena City Board of Educ.*, C.D. Cal. 1974, 375 F. Supp. 1304.

The school committee plan presented no more than a hope for desegregation in Boston. The proposed assignment process promised an administrative nightmare, contemplating a seven-week-long individualized assignment process for over 80,000 children. Ultimately it failed to do what the school committee hoped it would, viz., avoid "forced busing", since it required mandatory transportation of students to resource centers for desegregation purposes. For these reasons and those set out in the Masters' Report in Part I, pp. 9-16, the court adopts their recommendation and holds the school committee plan to be constitutionally inadequate.

Added to the inadequacy of the school committee plan is a history of the committee's failing, when granted time by the court, to file promised plans. The promised Option A alternatives to the state court plan last July were filed but not approved by the Boston School Committee. The time granted from September, when a filing date was

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established, to December 16, resulted in the committee's repudiation of the plan developed by its school department staff. The month of January was granted for formulation of a plan that failed to promise substantial desegregation. Now, approximately three months before school is due to open in September, time does not permit another court request to the school committee to produce yet another desegregation plan. Under the circumstances the court has no alternative but to take the initiative in devising a desegregation plan. "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann, supra,* 402 U.S. at 16.

The masters have, in accordance with the court's order of reference, analyzed and considered the plan filed by the plaintiffs and the plan, repudiated by the school committee, which was filed on December 16 with the court. For the reasons stated by the masters in Part I, pp. 17-28 of their report filed March 31, 1975, and because the court finds the plan proposed by the masters with revisions ordered by the court to be preferable for reasons of feasibility, the court declines to adopt either the plaintiffs' proposed plan or the December 16 proposed plan.

B.

General Principles Governing Remedy

In making its findings as to plans submitted by the parties and in deciding upon the remedial orders herein promulgated the court has observed and relied upon the legal principles which are set forth under the subheadings which follow.

Basis of Court's Power and Duty

The power of the court to order desegregation arises out of the court's finding in June 1974 that the plaintiffs have been discriminated against because of their race and

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denial equal educational opportunity through intentional segregation. The court is obliged, as it is empowered, to remedy this wrong. An abiding concern must be to assure that minority students are afforded equal educational opportunity. The plan which the court adopts as a remedy in this case does not rest on any supposed constitutional right of a student to attend a school that has a particular ethnic composition, or whose ethnic composition matches that of the school system as a whole. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 1971, 402 U.S. 1, 16, 24; *Milliken* v. *Bradley,* 1974, 418 U.S. 717, 741 n. 19. Nor does the plan reflect any imagined independent constitutional power of the court to decide what educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of this segregation. *Brown* v. *Board of Education,* 1955, 349 U.S. 294, 299 ("Brown II"); *Swann, supra,* 402 U.S. at 16. Only the default of the school committee in this case has obliged the court to employ the help of the appointed experts and masters and to draw an adequate plan.

The goal of the court in formulating a remedy for intentional segregation of the schools is to eliminate government-imposed isolation of blacks within the school system. Largely as a result of school committee actions, most students in Boston attend schools that are either "black" or "white".[4] The remedy in this case must convert this "dual" system to one "without a 'white'

[4] See *Morgan, supra,* 379 F.Supp. at 424-25, setting out enrollment statistics for 1971-72. Even after implementation of a partial desegregation plan in September 1974, continuing segregation is pronounced at the lower grade levels. See attendance statistics cited by the court at the hearing on April 18, 1975, Tr. 45-49.

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school and a 'Negro' school, but just schools." *Green* v. *County School Board,* 1968, 391 U.S. 430, 442. This does not mean that all schools in the system must show the same or nearly the same ethnic compositions, but rather that the remedy should eliminate assignment patterns that leave some schools so disproportionate in their ethnic makeup that they are in effect "Negro" or "white" schools — to use the language of *Green.* The remedy also should eliminate conditions likely to produce such school compositions in the future. Exceptional circumstances occasionally can justify exceptions to pursuit of this goal, but the goal remains.

Barring Affirmative Discrimination

The defendant school committee must be forbidden to take any further actions affirmatively discriminating against minority students on the basis of race. An order to this effect appeared in the court's opinion and order entered June 21, 1974. Appendix B. It is upon this central concept that the entire desegregation plan rests: that minority students may not be excluded from public school programs or activities on the basis of race, either directly, as happened more than a century ago, cf. *Roberts* v. *City of Boston,* 1849, 5 Cush. 198, or indirectly, as has occurred more recently. See *Swann, supra,* 402 U.S. at 23. The simplicity of the requirement that affirmative acts of discrimination must end does not, however, imply simplicity of enforcement. The consequences of years of segregative practices will be eradicated only with great effort and understanding. During desegregation, inefficiencies and failures of responsiveness that formerly were only troublesome can become intolerable. Therefore, the plan in this case includes means to assure effective administration, e.g., elementary schools must have principals. Cf. *Plaquemines Parish School Board* v. *United States,* 5 Cir. 1969, 415 F.2d 817, 821 n. 2. The plan calls on community dis-

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tricts to develop educational programs suited to the varying needs of students in particular districts. See, e.g., *United States* v. *Texas,* E.D. Tex. 1971, 342 F. Supp. 24, 30-34, aff'd, 5 Cir. 1972, 466 F.2d 518. And help that in other circumstances would be only desirable — the aid, for example, to be provided in this case by the universities and colleges, and by the several citizens' groups — becomes essential. Cf. *United States* v. *Texas, supra*; and see generally, *Hart* v. *Community School Board of Brooklyn,* E.D. N.Y. 1974, 383 F. Supp. 699, appeal dismissed, 2 Cir. 1974, 497 F.2d 1027. These points are expanded under the subheading, *infra,* entitled "Multiplicity of Measures."

Preventing Continuing Injury

The plaintiffs in this case do not seek a remedy that would compensate them, as a class, for the injury already wrought by the defendants' long-practiced racial discrimination. That injury, of course, is immense.[5] See *Milliken, supra* (White, J., dissenting), 418 U.S. at 779-780. The desegregation plan that the court orders cannot make the plaintiffs whole nor, for that matter, anyone who has been affected by the racial divisions in this city, which are in part traceable to the defendants' segregative practices. Rather, the remedy must go beyond an order that forbids further acts of affirmative discrimination in order to assure that past discriminatory practices will work no further harm.

Years of segregative manipulation of student assignment, school placement and expansion, and like practices

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[5] It has been suggested that a person denied equal educational opportunity might have a valid claim for money damages against those who denied him this fundamental right. Sugarman, *Accountability Through the Courts* . . . , 82 U. Chi. Schl. Rev. 233 (1974); cf. *Wood* v. *Strickland,* ___ U.S. ___, February 25, 1975, 43 U.S.L.W. 4293; *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.,* 4 Cir., April 15, 1975, 43 U.S.L.W. 2433.

found by the court in this case, present what the Supreme Court has described as "a loaded game board"; applied to such a school system, student assignment policies that ignore race would perpetuate the effects of the past segregative practices. *Swann, supra,* 402 U.S. at 28. The desegregation remedy in this case therefore must offer more than superficial neutrality. It must meet and neutralize the effects of past discrimination. The Supreme Court repeatedly has stressed this necessity, in requiring that a desegregation remedy do more than give effect to the "free" choices of students and parents, when the effect of these choices is simply to maintain the segregation of schools. See *Green, supra; Monroe* v. *Board of Commissioners of the City of Jackson,* 1968, 391 U.S. 450.

The day is past when desegregation is to be achieved through the struggle of a handful of pioneering black students willing to attend a school that is identifiably white. Nor is a simple rule of attendance at the nearest school adequate, when that rule is imposed on a pattern of segregated housing attributable in part to the segregative practices of school authorities. Such a "neutral" geographic attendance arrangement in Boston would sanction a freezing-in of the effects of past discrimination. Long-continued efforts by the school authorities to keep the races apart inevitably are reflected in both residential patterns and school locations and capacities. See *Morgan, supra,* 379 F. Supp. at 470; *Swann, supra,* 402 U.S. at 20-21; *Keyes* v. *School District No. 1, Denver, Colo.,* 1973, 413 U.S. 189, 202-03. This is not to say that ethnic and racial housing patterns result entirely from school segregation, but that past school policies would render discriminatory any simple nearest-school policy.[6]

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[6] At least during the period covered by the trial testimony, Boston never had a true neighborhood school policy. See in *Morgan, supra,* 379 F.Supp. at 473-474, the summary of school committee practices found to be "antithetical to a neighborhood school system."

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A desegregation plan is to be judged by its effectiveness; see *Swann, supra,* 402 U.S. at 25; *Green, supra,* 391 U.S. at 439; *Morgan, supra,* 379 F. Supp. at 482.

Eliminating Racially Identifiable Schools

Fundamentally a desegregation plan must eliminate racial identifiability of schools. Once faculty desegregation and facility equalization are under way, and other marks of a school's racial identification have been removed, the critical identifying quality of the school becomes, of course, the ethnic composition of the student body. When a history of segregation, followed by default of local school authorities in planning desegregation, forces the court to fashion a remedy, it is within the equitable authority of the court to use racial ratios as a starting point in formulating a remedy. *Swann, supra,* 402 U.S. at 25. Boston's school population of nearly 85,000 students is approximately 52% white, 36% black, and 12% other minority. Of course, no uniform degree of racial mixing of students is or could be required in order to end segregated schools and counter the pervasive effects of years of segregatory practices. See *Swann, supra,* 402 U.S. at 24; *Milliken, supra,* 418 U.S. at 740-41. But awareness of the racial composition of the system as a whole provides a reference for determining what are racially identifiable schools within that system. The test of identifiability then becomes substantial disproportion in composition compared to the racial composition of the school system. Cf. *Swann, supra,* 402 U.S. at 26.

A desegregation plan properly may leave some schools all or predominantly of one race where this composition can be shown to result from non-discriminatory considerations. *Swann, supra,* 402 U.S. at 26. The court's plan in this case leaves some identifiably white schools at the lower grade levels in East Boston. The considerations

that support such treatment of these schools are set out *infra* at pp. 52-55.

Identifiably one-race schools in a school system are to be eliminated because of two sorts of injury that may be inflicted on the minority students in such a school system. First, racial or ethnic isolation is likely to be felt as an affront. The one-race identification of the school is a continual reminder of the past exclusionary practices of the school system; practices that, the Supreme Court observed in *Brown,* generate "a feeling of inferiority as to the [children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown, supra,* 347 U.S. at 494. Second, minority students assigned to identifiably minority schools are cut off from the majority culture which is widely reflected in the standards, explicit and implicit, that determine success in our society. See *Brown, supra,* 347 U.S. at 493-94. An individual may decide, of course, that he prefers to avoid the majority culture; but the public school system may not impose that isolation.

This concern is expressed most clearly in the decisions that form the legal foundation on which *Brown* rests: *Sweatt* v. *Painter,* 1950, 339 U.S. 629, holding that a black law student must be admitted to the University of Texas law school, and not restricted to a newly-founded law school for blacks, in part because of the value to a future lawyer of contact with the people he later would work with — the predominantly white Texas bar of 1950; and *McLaurin* v. *Oklahoma State Regents,* 1950, 339 U.S. 637, holding that a black graduate student admitted to a state university was denied equal educational opportunity by regulations designed to isolate him from the white students, impairing "his ability to study, to engage in discussions and exchange views with other students . . . ."

Competing Interests

Inevitably, the court's primary concern in a desegregation case conflicts with other legitimate concerns. The remedy must accommodate these other interests. But the accommodation must reflect the primacy of the need to achieve equal opportunity in education. In its respect for a variety of interests, a desegregation plan resembles other equitable remedies. The Supreme Court has stated concisely a rough guideline for reconciling these interests.

> Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. *Davis* v. *Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 37.

The task of a court devising a desegegation plan, then, is to give content to the broad concept, "the practicalities . . .", while at the same time making "every effort to achieve the greatest possible degree of actual desegregation."

A variety of factors require that school ethnic compositions vary in various parts of the school system. Small variations in racial or ethnic composition of schools do not make them racially identifiable nor diminish substantially the degree of "actual desegregation." Where a school departs so far from the systemwide composition, however, as to become racially identifiable, a different question is presented. The school's composition reduces the system's degree of "actual desegregation." Here the "practicalities" requiring this result must be specified.

"Practicalities of the Situation"

The "practicalities" that require flexibility in a remedy are simply all the legitimate concerns of the community. There can be no exhaustive list. These concerns vary greatly, of course, in their weight. A "practicality" fre-

quently urged upon this court is the desirability of minimizing "forced busing", i.e., assignments to schools beyond walking distance. That concern certainly is legitimate, and entitled to weight. The court's "Guidelines" of October 31, 1974 called for a plan that minimized busing. The plan that the court has ordered into effect reflects the court's continuing efforts to hold compulsory busing to a minimum. The boundaries of the several districts were drawn to minimize the numbers of students bused and to limit distance travelled. A range of racial compositions of schools within each district also serves to minimize busing. Educational concerns also affect the form of a remedy. For example, the districts into which the system has been divided have been drawn so as to include appropriate school facilities at all levels and to avoid where possible one or two grade schools.

Some of the parties have urged that the court limit the extent of actual desegregation lest children from middle class white families leave the public school system and to prevent racial turmoil and violence in Boston's schools and communities. The plaintiffs have argued, just as vigorously, that the court may not consider either "white flight" or the prospect of resistance to desegregation, in formulating the remedy. These prophecies of "white flight" and racial turmoil, like opposition itself, see e.g., *Brown II, supra*, 349 U.S. at 300, are not "practicalities" that can be weighed against the rights of the plaintiffs.[7] Opposition to a lawful desegregation remedy reflects no

[7] Another ground for refusing to limit a remedy for fear of "white flight" is that a court would be presumptuous to try to predict the effect upon long-term trends in population movements of its adoption of a particular element, otherwise constitutionally required, in a desegregation plan. The masters received expert testimony on the subject of "white flight" from Boston's public schools during the current school year and concluded that the contention was a "misleading fiction." Report of the Masters, at 65 n. 1.

legitimate interest. Expression of that opposition constitutes a problem, of course, which the desegregation plan must confront in its implementation. But it does not constitute one of the "practicalities" to which the plan itself properly can make an accommodation. The court may not limit desegregation in deference to such opposition. *Monroe, supra,* 391 U.S. at 459; *United States* v. *Scotland Neck Board of Education,* 1972, 407 U.S. 484, 491; *Hart, supra,* 383 F. Supp. at 742-43. To hold otherwise would be to trade away the constitutional rights of children to receive a desegregated education in order to appease parents and voters who prefer segregation to desegregation which involves forced busing, i.e., assignments to schools beyond walking distance. The impropriety of such an accommodation has long since been decided. *Brown II, supra,* 349 U.S. at 300; see *Cooper* v. *Aaron,* 1958, 358 U.S. 1, 7; cf. *Morgan* v. *Kerrigan,* 1 Cir. 1974, 509 F.2d 580, 587. The rule of law must prevail.

Multiplicity of Measures

Since equal educational opportunity is a central theme of the desegregation remedy, in this case as in others, *Morgan, supra,* 1 Cir. 1974, 509 F.2d 580, 598 n. 29, the remedy must do more than redistribute students. Reassignments to eliminate segregation are one means to the end of providing equal opportunity. The remedy should include measures to assure effective implementation, first, of the ban on active discrimination, second, of efforts to meet the special problems that accompany desegregation: the persisting effects of past discrimination, and the difficulties of transition, for both black and white students, from segregated to desegregated schooling.

The plan in this case includes measures directed to these problems. The equalization of services at schools that have been unequal is a task that the universities and colleges have expressed a willingness to help carry out.

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The plan's provisions for district superintendents, councils of principals within each district, and a principal or headmaster at each school all are intended to assure that a responsible administration will be available to assure that the plan is carried out effectively. Such an administrative network can prevent some schools lagging behind others, cf. *Plaquemines Parish School Board* v. *United States*, 5 Cir. 1969, 415 F.2d 817, esp. n. 2 at 821; see generally *Swann, supra*, 402 U.S. at 18-19; *United States* v. *Jefferson County Board of Education*, 5 Cir. 1967, 380 F.2d 385, 394-395; and see to it that curricula and programs of instruction are not discriminatory. See *United States* v. *Texas*, E.D. Tex. 1971, 342 F. Supp. 24, 30-34, aff'd, 5 Cir. 1972, 466 F.2d 518.

The nature of instruction given in the schools must also receive the attention of the court and its representatives. Instruction must be non-discriminatory and avoid racial stereotyping. The court's plan relies primarily on school personnel to assure non-discriminatory instruction. Their efforts will be monitored by citizen groups established under the plan. Other courts have made more detailed orders for the equalization of services, directing curriculum changes, construction, and acquisition of particular types of equipment. See, e.g., *Plaquemines, supra*, 415 F.2d at 831 (facilities to be constructed, including athletic fields with backstops); *Lee* v. *Macon County Board of Education*, M.D. Ala. 1970, 317 F. Supp. 103, 111, 112 (curricula of college-level trade schools to be equalized; one school to acquire an appropriate computer). In other cases remedial programs have been specifically required. See, e.g., *Jefferson County, supra*, 380 F.2d at 394. The plan in this case provides for a detailed review of vocational education programs, but in general relies on the performance of school staff and citizen groups to ensure provision of non-discriminatory instruction and services.

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The plan goes beyond assuring that no school is markedly worse than another by providing for the development of magnet programs, so that desegregation may as far as possible occur through voluntary choices. This use of specialized programs originated in this case with proposals in the plan submitted by the defendant school committee, as strengthened and clarified by the masters. Use of magnet programs to achieve desegregation is a method urged by the federal Education Amendments of 1974, Pub. L. 93-380, sec. 214(f), 20 U.S.C. 1713(f), and supported by a Massachusetts statute providing for state funding for planning and implementation of such programs by local authorities. 1974 Mass. Acts and Resolves c. 636, § 8, Mass. G.L. c. 71, §§ 37I-37J. See *Hart, supra,* 383 F. Supp. 769. In other cities magnet programs have aided desegregation. See *Booker* v. *Special School District No. 1,* Minneapolis, Minn., D. Minn. 1972, 351 F. Supp. 799 (approving but not describing plan; the plan's use of magnet schools was described in exhibits submitted to the masters in the instant case).

In order to develop true "magnets" — programs distinctive and attractive enough to draw ample applications — the plan calls on the expert aid of colleges and universities and of the city's business and cultural communities. Cf. *Arvizu* v. *Waco Independent School District,* W.D. Tex. 1973, 373 F. Supp. 1264, 1280, aff'd in part, rev'd as to other issues, 5 Cir. 1974, 495 F.2d 499 (expert aid used in development of special bilingual, bicultural program in defendants' desegregation plan). These institutions will help each magnet school to build its special emphasis, an emphasis based on the school's present strengths and interests.

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C.

School Districts

The citywide school district, containing schools at each grade level that are open to students from throughout the city, and the assignment process calling for parent and student involvement in educational choices in all districts are central to the court's plan. The purposes of the plan include the achievement of desegregation through voluntary choices to the maximum extent possible, and the provision of appropriate and attractive educational programs for students "at the end of the busride." Each citywide school has distinctive programs or features that can bring together students with common interests of all races.[8] In order to increase the magnetism of these schools, the court has paired colleges and universities with particular schools. Businesses have worked and will continue working in pairings with high schools. The resources of Boston are rich, and many cultural institutions and other groups have much to contribute to the public schools. The pairings established in this plan with particular schools and colleges and universities will, the court expects, create new links and strengthen old ones between public school students and these institutions of higher education. They can provide a focus for the good will and creative talents and unique resources of these institutions.

Each citywide school's student body will be desegregated and will closely reflect the composition of the city's student population. Students who apply to a citywide school will know, then, that there will be no overwhelming majority of any race at the school such as might threaten or isolate the student. Cf. *Hart*, *supra*, 383 F. Supp. at

[8] The word "race" where used in this portion of the opinion refers also to ethnic groups such as Hispanics and Asian-Americans classified as "other minority."

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756. A citywide school, open to all students, will be no one's turf, i.e., will not be the territory of any one neighborhood or race. The goal of this arrangement is to make the school distinctive and attractive because of its concentration on the arts, or the classics, or on open space teaching methods, for example. It is to this end that citywide racial ratios will limit the enrollment at these schools.

The provisions of the plan regarding citywide schools are thus designed to attract students voluntarily to desegregated schools. Voluntary desegregation in this context will allow fulfillment of student preferences as to special programs and features, decreased the likelihood of racial conflict and tension and increase the probability that uninterrupted learning can take place. It is an attempt to achieve desegregated education with the emphasis on education.

Community districts and the schools serving residents of those districts recognize the desire of many parents that students attend school within a defined geographical area in which they reside. The districts drawn in this plan reflect only generally concepts of communities as ethnic or racial neighborhoods. Rather, the communities defined by the plan's district lines are communities of schools, serving a defined body of students from kindergarten through grade 13. Parents and students from several neighborhoods will be served by the same group of schools, and through involvement in school activities and local district councils may forge new ties among neighborhoods.

Schools in community districts are equal in educational offerings to citywide schools. Colleges, universities and businesses are also paired with community district high schools to aid in developing programs at each district high school which shall offer a comprehensive education that reflects the needs of the district's students.

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The district lines in the court's plan have been altered in some instances from those recommended by the masters. A key feature of all student desegregation plans filed and urged by the parties since the court's order of October 31, 1974 has been the division of the city into six or more zones (or "districts") and the desegregation of students residing in those zones using the school facilities located in them. The racial composition of the public school population resident in a particular district was crucial in projecting the racial composition of district schools, whose enrollments would consist primarily of students residing in the district.[9] The masters made substantial changes in the projected racial compositions of community districts from their draft report, filed March 21, to their final report, filed March 31. For example, in the West Roxbury district, the percentage of white students was increased from 70% to 80% and in the South Boston district from 50% to 60%. In order to obtain the most reliable information on which to base projections of the racial composition of districts, on April 2 the court ordered the school committee to file by April 10 an alphabetical list of all students enrolled in the public schools, showing their addresses and ethnicity. When the list was filed it showed, for example, that the projected percentage of white students in the West Roxbury district was 92% and in the South Boston district was 67%; in the district containing the lowest percentage of white students, the Burke district, the alphabetical list showed that the percentage of black students in that district was 63% rather than 50% as estimated by the masters in both their reports. Also, the masters' report filed March 31 added a provision permitting student transfers from one district to another for reasons including a

[9] Student transfers from one district to another had been virtually eliminated by the court's interlocutory order of June 21, 1974 and a series of orders entered later in 1974.

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"revision of program of students", thereby complicating the task of making reliable projections of the racial composition of student bodies.

The data received by the court on April 10, 1975 raised the probability that the district lines recommended by the masters would define overwhelmingly white areas of the city, such as West Roxbury and South Boston, close to heavily black and Hispanic areas such as the Burke district. This could result in the sort of residential instability that could destroy in a few years the desegregation accomplished initially in those districts. White parents seeking to leave a district where their children were a minority in the school population could move to districts with white majorities, gradually resegregating both the districts they left and those they entered. Just as the location of schools is acknowledged to have an effect on residential segregation, *Swann, supra,* 402 U.S. at 20, so large disparities in the racial composition of districts may endanger desegregation, and the court has an obligation to seek a plan that offers hope of lasting desegregation. In Boston, a city where it has been possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district, the ability and need constitutionally to achieve a rough equality of racial compositions among districts is strong. The district lines ordered by the court produce districts that, with one exception, resemble adjacent districts in their racial composition, while considering the adequacy, capacity and location of schools at each grade level for the district's student population.

The district lines ordered by the court were also designed to enhance the promising educational proposals made by the masters. Students and parents now, in choosing among citywide and community district schools, will choose on the

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basis of the educational emphasis at a school as it meets the educational goals and needs of the student, and not on the basis of the racial compositions of a school.

The districts in the court's plan have been drawn to avoid the need to deny students entry to citywide schools because of their race and district of residence. Under the masters' district lines, even the desegregation achieved within a district could be lost were admissions to a citywide school made without regard to the district's racial composition. To preserve desegregation within districts, blacks in West Roxbury and South Boston and whites in Burke might have to be denied a chance to attend the citywide school of their preference because of the need to avoid one-race schools in community districts. With the court's districts, which have a more desegregated student population to work from when allowing citywide admissions, the admissions procedures can permit students of every race from all districts to apply and be admitted to citywide schools while still preventing any community district schools from being overwhelmingly one race.

Another consequence of the receipt of current enrollment data after the masters ended their work was that their plan's promise of a community district seat for all high school students could not be delivered. A shortage of at least 6,000 community district seats appeared. Over the past several years Boston has had a shortage of seats for high school students. There are, however, sufficient seats for the city's high school students overall. Most of the citywide schools in the court's plan are high schools, and close to half of the city's high school students can be accommodated in the citywide schools. If students apply to these schools in large numbers, fewer students will be denied their choice of a community district high school and have to receive assignments to citywide schools. Moreover, a number of construction projects now in progress

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will alleviate the shortage of high school seats when completed within the next few years. These include Southwest I and Madison Park High School now under construction and an Occupational Resource Center and Southwest II now in the planning stages.

An exception to some of the previous discussion regarding community school districts is the district drawn for East Boston. East Boston, a section of Boston that has a school population, 95% white, of about 5700 students, is located across the harbor and adjacent to the Logan International Airport. It is approached via tunnels that run beneath the harbor and has good public transportation linking it with downtown Boston. The first thing to be noted about the East Boston community district under this plan is that there will be some desegregation of East Boston schools and students. At the elementary level, two schools in East Boston will be citywide schools, with desegregated student bodies. Students residing in East Boston can attend these schools only on a desegregated basis. At the middle school level, the new Barnes middle school, scheduled to open in September 1976, will also be a citywide school, leaving the old Barnes as the only middle school solely for district residents. At the high school level, East Boston Technical High will operate beginning in 1976-77 as a fully desegregated citywide school. Those resident high school students who are not admitted to East Boston Technical High will then be required to attend other desegregated citywide high schools in other sections of Boston. There will be no community district high school in the East Boston school district after the 1975-76 school year. In addition, the cooperative industrial program in machine shop instruction at East Boston High School will for the school year 1975-76 open its entering class and any vacancies in the program to enrollment by students from other districts on a desegregated basis.

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Only those East Boston elementary and middle school students who do not choose citywide schools will remain in virtually all white schools. To desegregate these 11 schools in that section of the city would require transporting between four and five thousand children either into or out of other parts of Boston, many through the tunnels with their gassy air at heavy traffic hours, for distances up to 5.2 miles one way. In addition, unless the schools and students of East Boston were divided among two or more districts, which would deny East Boston residents any concept of a community of schools, the merging of East Boston with the Madison Park District would create a geographically large district and place a further burden on black and other minority students by dispersing them to Back Bay, downtown, the North End, Charlestown and East Boston. The treatment of East Boston under the court's plan does not in our view deny or deprive the plaintiffs of the full vindication of their constitutional rights. There will be no segregated, predominantly black schools under the court's plan.[10] We find, therefore, that the slight advantages of desegregating those East Boston schools which will remain nearly all white under the plan are outweighed by equitable considerations of geography, education and burden of transportation in this instance. As to the prospect of East Boston becoming a haven for Boston parents seeking to avoid desegregation and thereby resegregating other districts, no party has contended that this will occur and we think it unlikely.

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[10] The cases are distinguishable, therefore, in which the incorporation of a geographically separate area was needed in order to desegregate the system's predominantly black schools. See, e.g., *Davis* v. *Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33; *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1969, 406 F.2d 1086, *cert. denied* 1969, 395 U.S. 907; *United States* v. *Indianola Municipal Separate School District*, 5 Cir. 1969, 410 F.2d 626, *cert. denied* 1970, 396 U.S. 1011.

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The districts in this plan and the guidelines for assigning students have been drawn to minimize required transportation as much as possible consistently with desegregating the city's schools. It should be remembered that busing has been commonplace in Boston's public schools for decades. In 1972, the school committee leased 129 buses for student transportation each day. And, in 1972, more than 30,000 students—roughly 35% of the entire student population—were bused or used the subway daily to and from school. While, as stated in the plan, it is not possible to desegregate Boston's schools without mandatory transportation, distances and times travelled will be reasonable compared to those required in other desegregation cases and, for elementary and middle school students, within the bounds of their school districts. The plan's estimate, at p. 81, that approximately 21,000 students will be mandatorily transported rests upon an analysis by the court-appointed experts. Only rough estimates can be made because the number of students who will choose to attend citywide schools and programs cannot be known until after completion of the assignment process.

The court has heard members of the school committee in testimony and others speak against "forced busing" and has received hundreds of letters protesting its use in connection with the state court plan currently in operation. Toward lessening widespread misunderstanding on the point, it may be stated that the court does not favor forced busing. Nor, for that matter, have the plaintiffs advocated forced busing. What the plaintiffs seek, and what the law of the land as interpreted by the Supreme Court of the United States commands, is that plaintiffs' right to attend desegregated schools be realized. That right cannot lawfully be limited to walk-in schools. *Swann, supra,* 402 U.S. at 30. If there were a way to accomplish desegre-

gation in Boston without transporting students to schools beyond walking distance, the court and all parties would prefer that alternative. In past years, feasible proposals that would have substantially lessened segregation through redistricting without busing were made by various public agencies and uniformly rejected or evaded by the Boston School Committee. The harvest of these years of obstruction and of maintenance of segregated schools is that today, given the locations and capacities of its school buildings and the racial concentrations of its population, Boston is simply not a city that can provide its black schoolchildren with a desegregated education absent considerable mandatory transportation. No party familiar with the requirements of the law and with the city has ever suggested otherwise.

Regrettably the same cannot be said about various elected officials. This is an election year in Boston and candidates are already campaigning for municipal offices. Many of them are proclaiming that they are for school desegregation but against forced busing. They refuse to face up to the dilemma stated by school committee member Kerrigan in his testimony, *supra* p. 13, as follows:

> "It is unfortunate that is the way our society exists, the way the housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing."

They tell the parents that they will take steps to bring about an amendment to the federal Constitution that will ban forced busing, neglecting to add that it takes several years to adopt even a relatively noncontroversial amendment. Meanwhile the children suffer.

In the court's opinion the effect of mandatory transportation on students can be neutral or destructive, depending upon the community's response to the requirements of

the law. Here "community" means not only parents and school department personnel but also leaders of civic, religious, fraternal, business, labor, educational, cultural and other organizations and institutions. If the atmosphere surrounding desegregation is such that a child goes to a school where children of other races welcome him without fear, and where he can learn in an educationally productive atmosphere, the fact that his school is a bus-ride away may be little more than an inconvenience. This is not to say that enormous efforts will not be required to reduce racial tensions which have increased in Boston during the current school year, and which continue to be exploited by various elected officials. No effort will be spared to assure the safety of students while attending or en route to a school. Many public and private agencies will be working for peaceful implementation of the plan, including the 42 member Citywide Coordinating Council recently appointed by the court. The plan adopted by the court attempts to minimize forced busing and mute the legally pointless controversy surrounding it, while at the same time advancing the positive goal of improving the quality of education available in Boston's public schools for all students whatever their race or ethnic origin.

D.

Guidelines for Assigning Students

The plan's assignment guidelines aim, first, to make sure that schools are not identifiably one-race, and secondly, to assure that no racial or ethnic group—black, white or other minority—is disproportionately isolated in any school, considering its share in the relevant student population. The first aim is of course basic to desegregation. But the second, important to the remedy's durability, accounts for the greater part of the plan's detailed assign-

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ment provisions.[11] In assignments to citywide schools, the guidelines seek to prevent isolation very simply, by providing for close adherence to systemwide composition. Cf. *Hart, supra*, 383 F.Supp. at 756 (magnet school composition to lie within ten percentage points of district composition). Since the citywide schools enroll students from throughout the system, the lack of the geographical constraints such as control assignment guidelines in community districts permits enrollments at these citywide schools reflecting the school system's overall enrollment. Other reasons for the setting of ranges of racial composition in citywide schools have been explained in the previous section of this memorandum. In community districts, the assignment guidelines allow for generally wider variations, but still within limits designed to achieve the same goal, preventing disproportionate isolation.

The variations in the composition of community district schools recognize the central importance of minimizing the distance between the student's home and the assigned school, especially at the elementary level, and the practical difficulties of making geographical assignments. Each community district school will have assigned to it an attendance area made up of a set of "geocodes."[12] Geocode assign-

[11] The plan's student assignment guidelines set out a process for assignment, rather than a finished attendance plan. A finished plan for community district schools, showing the geocode areas served by each community district school, is to be drawn by the school department pursuant to the guidelines and will be reviewed by the court. The review will consider not only whether the school compositions lie within the guideline limits but also, more generally, whether the assignments show a reasonable accommodation, within the permissible ranges, of the several interests the plan is designed to serve.

[12] "Geocodes" are the 800-odd areas, each several blocks in size, into which the school department has divided the city for planning purposes (as noted in the plan, pp. 7-8). The units were devised originally for police reporting purposes and vary in geographical area and also in student population, ranging from a few to several hundred students.

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ment, unlike individual or address assignment recommended by the masters,[13] allows students to attend school with their immediate neighbors of all races. Assignment by geocodes can be done much more rapidly than assignment by individual address, and will enable notification of parents of student assignments at an earlier date. Use of geocodes means, for example, that if most of the students residing in a geocode are white, and that geocode is assigned for desegregation to a school in a black area, any black students living in that geocode will also be assigned to that school. Thus some transportation of black students into black areas, and of white students into white areas, will occur and in this sense will not be directly desegregative. However, geocode assignments offer the advantage of fostering contact of students in school with their neighbors at home within a geocode. Students who are transported to school will travel with their neighbors, attend school with them, and be able to maintain ties developed in school while in their home neighborhoods. The advantages of geocode assignment, speed and even group treatment, make it preferable in the court's opinion to a system of school assignment that separates next door neighbors consistently on the basis of race. The difficulty of fitting the disparate geocodes to the system's irregularly distributed school facilities demands some leeway in school composition.[14] This leeway, easing the assignment process, operates also to diminish the amount of busing that is required.

The guidelines provide this appropriate latitude for assignments to community district schools. The limits on

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[13] The relative merits of assignments by address and by geocode are discussed at length in the State Defendants' Critique of Masters' Plan filed April 8, 1975, at pp. 48-51.

[14] The same necessity supports the plan's provision, at p. 72, that geocodes may in some instances be divided into as many as three parts.

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variation have been determined by considering the competing interests that to the court seem most important. Once racially identifiable schools have been eliminated, two primary concerns remain: on the one hand, to allow students to attend school near their homes; on the other hand, to minimize any sense of isolation that students, white, black or other minority, might feel. The guidelines accommodate these two interests by letting the breadth of variation[15] depend on the size of the racial or ethnic group that is considered. A large group can accept a relatively large reduction in numbers without its members' feeling the discomfort of relative isolation. Members of a small group reduced by the same number of students might be reduced to such an extent as to feel isolated, uneasy and defensive. That is the basis for the guidelines' use of a constant percentage (25%) to define variation limits: the larger the group, the larger will be the possible variation in the number of students of that group assigned to a particular school.

The other guidelines are intended to assure that "other minority" students will also be afforded "equally desegregated education", as stated in this court's order of October 31, 1974. They therefore provide for assignments that neither isolate nor excessively concentrate "other minority" students. This policy is adopted in the interests of all, not only for the sake of the "other minority" students. Taking advantage of Boston's ethnic variety, then, the guidelines provide that in the districts with substantial numbers of "other minority" students (about

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[15] Variation is measured from district rather than system composition in community district assignments. Each district's schools will enroll only students residing in the district. The range of racial compositions in the schools within a district will be determined by reference to the percentages labelled "K-13 Total" at the bottom line of the tables following the eight district maps appearing in the plan.

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half of the eight community districts), students from that group will be enrolled at each school. In Madison Park District, for example, at every district school each of the three major racial or ethnic groups will be strongly represented, but none will make up a majority. "Other minority" students in this district—slightly more than haf of them Oriental, most of the remainder Hispanic—will constitute from one-fifth to slightly less than a third of each school's student body.

The plan's assignment guidelines thus take account of "other minority" students, but do not simply aggregate them with black students, in prescribing school composition limits. Plaintiffs-intervenors, El Comite de Padres Pro Defensa de la Educacion Bilingue, representing the class of Spanish-speaking students and their parents, have stressed their right to adequate bilingual education. The remedy accordingly concentrates on providing bilingual schooling for Hispanic students and for others in need of this service.

Assignment of bilingual students before others will prevent excessive dispersal. Thus the "clustering" of bilingual classes will be possible and Boston's schools will be enabled to fulfill the promise of this state's exemplary bilingual education law (Transitional Bilingual Education Act, Mass. G.L. c. 71A), as well as to meet the requirements of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000d). See 35 Federal Register 11595 (1970); *Lau* v. *Nichols*, 1974, 414 U.S. 563; *United States* v. *Texas Education Agency*, 5 Cir. 1972 (en banc), 467 F.2d 848, motion to clarify mandate denied, 5 Cir. 1973, 470 F.2d 1001.

Without merely aggregating black and other minority students, the guidelines prescribed at pp. 72-76 of the plan (in conjunction with the racial compositions of the various community districts) nevertheless provide that plaintiff black students shall not be assigned to schools

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with only "other minority" students. Cf. *Arvizu* v. *Waco Independent School District*, W.D. Tex. 1973, 373 F.Supp. 1264, 1268-70, aff'd in part, rev'd as to other issues, 5 Cir. 1974, 495 F.2d 499. This result is appropriate to satisfy both of the primary concerns of desegregation. Black students should not be assigned in a manner that suggests they have been relegated to "minority" schools; for the "segregated" quality of a school depends in part on the way the community looks upon that school. See *Keyes*, *supra*, 413 U.S. at 196. And black students ought not to be assigned in a manner that isolates them from the majority culture. The assignment guidelines aim for three-way desegregation in the schools for two primary reasons: first, to provide a proper remedy for the plaintiff class of black students and parents; second, to afford to all groups —white, black and other minority—the sense of adequate representation that can help achieve peaceful and lasting desegregation.

E.

Examination Schools

The desegregation of the examination schools, Boston Latin School, Boston Latin Academy, and Boston Technical High, particularly the two Latin schools which have six-year programs beginning in the seventh grade, has been a particular subject of concern to the parties and the court throughout the process of formulating a remedy for implementation in the fall of 1975. Yet despite many hours of attention, the parties and the court have had very little data with which to analyze the effects of various proposals affecting the grade structure and admissions process of these schools. Much information was filed on May 2, 1975 which will have to be analyzed by the parties and the court before it is used to aid in the establishment of admissions criteria for future years and for other purposes. But the need for additional information and for evaluation of the

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results of proposed and ordered procedures are the reasons for the interim nature of the court's order with respect to the examination schools.

The school department's computer data of April 9, 1975 show 113 blacks and 13 Hispanic students at Boston Latin School out of a total of 1893 students; and 97 black and 7 Hispanic students out of a total of 1097 students at Boston Latin Academy. Boston Technical High is less segregated, with a student population that is 67% white, 25% black and 8% other minority.

All of the proposals made by the parties and the masters for desegregation of the Latin and Technical schools have directed desegregation efforts toward the entering grades at those schools, the seventh and ninth grades. The program at the examination schools is one that each year builds upon the subjects taken the prior year and which differs in content from the general comprehensive high school's curriculum. The Latin schools provide a strong emphasis on classics and languages; Technical High, on the areas of mathematics and science. Introduction of new students at every grade could seriously affect the programs at the schools and leave the students entering those particular grades without the prior years' preparation that is needed to keep pace with and fully benefit from the programs at these schools. The court finds that desegregation of only the entering grades at the examination schools, instead of desegregating all grades at once, is plainly appropriate in this case. The students already in attendance will be unaffected by the court's order, except for the addition to the present eighth grade (grade nine next fall) of a relatively small number of students admitted on a desegregated basis. A gradual desegregation of the entering classes will allow the school department the opportunity to identify and recruit increasing numbers of black and

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Hispanic students who are qualified to attend and succeed at the examination schools.

Students' scores on the SSAT examination, either alone or in combination with grade point averages, have been proposed by several parties for use as criteria for admission to the examination schools. The Latin School Alumni Associations, acting as amicus curiae, developed the most detailed proposal, which was adopted by the School Committee. Under their proposal, 65% of the seats in the entering classes would be filled solely on the basis of SSAT scores, without regard to race. The remaining 35% of the seats would be filled on a ratio of 25 blacks to 10 whites, using SSAT scores in combination with grade point averages, but setting a score in the 50th pencentile on the SSAT as a floor for admission.[16] No evidence or data has been received that would demonstrate that this use of the SSAT would result in substantial desegregation of the entering grades at the examination schools. The only evidence on this issue, filed by plaintiffs, shows that using the results of the *1973* SSAT examination, a use of the median score as a floor for admissions would have created entering classes of 10% black at Boston Latin School, 20% black at Boston Latin Academy and 19% black at Boston Technical High. The affidavit of Mr. Wilfred L. O'Leary, headmaster of Boston Latin School, while urging use of the 50th percentile as a minimum standard, concedes that this standard is an assessment based on his experience, not on racial data or studies that would show that students scoring below that mark would be unable to learn and succeed within the Latin schools' programs.

Nor is it clear that the SSAT is the most valid or even

[16] Under the court's order, the Latin School Alumni Associations' proposal can be implemented if to do so would result in entering classes at the seventh and ninth grades containing 35% combined black and Hispanic enrollment.

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a generally valid method of identifying black and white students who can benefit from a Latin school curriculum. It is attractive because it is available, and apparently has value as a predictor of academic success. It is generally accepted, however, that blacks fare worse on this type of examination. There have been suggestions, but little evidence, that the SSAT itself is a culturally biased test. But more significant is that given the segregated history of the Boston public school system at the elementary school level, in particular the segregation still existing in advanced work classes, which successfully feed children into the examination schools and "prep" them for the examination, any use this year of an arbitrarily selected SSAT examination score cut-off that prevents the desegregation of these schools must be rejected. We do not have the information to suggest that a cut-off of the 50th, 40th or other percentile is an appropriate minimum standard. Nor can we say that it is impossible to develop admissions criteria that do identify students, black and white, as having the ability to benefit from and succeed in these schools' programs. We encourage the parties to work together on evolving such standards for use in future years. It is for these reasons that the court has made no specific all-inclusive order as to criteria for this year, but has, rather, permitted the school department to use grades and test scores as it deems appropriate to obtain desegregated entering classes at these schools.

The examination schools are citywide schools and are treated by the court plan as part of the network of magnet schools in citywide school district 9. In desegregating through citywide magnet schools, the plan requires that the enrollment at these schools be within a ten percent range of the racial composition of the school system as a whole. All other citywide schools will enroll new students at all grades in the fall of 1975, and will be at least 44%

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black and other minority. Because of the special nature of the examination schools, a more gradual process of desegregation has been adopted for these schools. As discussed above, only the entering classes at the schools are required to enroll new students, in order to preserve the strengths of the schools' sequential curriculum. And a minimum percentage of 35% black and other minority enrollment required at other citywide schools. The main reason for this lower minimum requirement in desegregating the examination schools is that all grades at the examination schools now enroll between 6% and 8% Asian-American students. Thus the anticipated enrollment in the entering class at the examination schools will be similar regarding racial and ethnic composition to that at other citywide high schools.

The masters recommended the phased elimination of the seventh and eighth grades at the Latin schools, to create a 9-12 grade program that conforms in grade structure to the rest of the public school system. Other parties have proposed the addition of a sixth grade, or the separation and creation of a Latin middle school, for the same reason. There are a number of educational reasons that either support or counter such proposals. If the Latin schools can be desegregated at the seventh and eighth grades, there is no necessity for discontinuing these grades as part of a desegregation remedy.[17] Should successful desegregation not be possible in this way, however, jurisdiction has been specifically retained regarding elimination of grades seven and eight, addition of grade six, or other changes

[17] The point has been made that it is desirable for all students in the system to choose their desired high school program at the same point, the end of middle school, in eighth grade. The Latin schools do, of course, take a limited number of students who enter at the ninth grade. There has, however, been no evidence that the existence of an earlier opportunity to enter the Latin schools disadvantages or denies equal educational opportunity disproportionately to black students.

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in the grade structure at the Latin schools. The school committee may for educational reasons make such changes in grade structure so long as they assure and do not impede desegregation at all grade levels.

The remainder of the plan adopts proposals of the Latin School Alumni Associations and the school committee for ongoing evaluation of admissions criteria and racial data, increased recruitment of black and Hispanic students, and desegregated preparatory and remedial programs.

F.

School Closings and Capacities

The plan calls for the closing of twenty school facilities, listed on p. 123, most at the elementary level. Ten other facilities which are now closed will remain closed under the plan and will not be rehabilitated. There are several school facilities, including the Old Quincy, the Washington Irving portables, the Bigelow portables and the Horace Mann school, which are not listed in the court plan either as schools to be closed or as usable facilities. The timing of the planned closing of the Old Quincy school and the future use of the other facilities are to be resolved through discussions between school department staff and the court-appointed experts, subject to the approval of the court.

The closing of schools as part of the plan serves a number of purposes. Many schools in Boston have long been recommended by many agencies, independent experts, and by the city and state, for closing or replacement as unfit for school use. The necessity of reassigning students for desegregation provides an opportunity to close some of the worst of these schools and make use of the more structurally sound facilities. A major reason for closing schools is that desegregation is more easily and economically achieved through the consolidation of student bodies. Many of the city's elementary schools in black areas have in the past been overcrowded; many elementary schools in

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white areas have been underutilized, e.g., when a new school was constructed to replace an old one in a predominantly white neighborhood, the school committee accommodated parents protesting the closing of the old one by keeping them both open. Should school facilities be uniformly used to capacity, an excess of several thousand available seats at the elementary school level would remain. Thus a number of the older elementary schools can be closed, with accompanying savings of the costs of operating and heating those schools. Elementary schools will be kept open whose locations enable busing to be minimized overall, and which permit the more efficient assignment of students by geocides, accomplishing desegregation and minimizing the need to split geocodes. Uniform utilization of facilities throughout the city will also tend to equalize the availability of the system's resources to all students.

School closings are being ordered on the basis of expert assessment of excess seating capacity for the number of students who will be in the schools in the various districts in the fall of 1975. The capacity figures listed in the plan are ceilings which may not be exceeded. These ceilings were set by the court-appointed experts after taking in most instances the most conservative of the estimates provided by state, city and school department officials and then further reducing that estimate in order to be on the safe side. Enrollments in most cases will be well below those ceilings, and will reflect the judgment of the school department and the court-appointed experts, subject to court review, as to what constitutes full and efficient utilization of the educational facilities of a particular school. The number of students attending district schools in 1975-76 will be less than the total number of residents in a district who enrolled in a public school this year, partly because substantial numbers from each district will be attending citywide magnet schools and programs. Also, over 2,000

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students who enrolled in school at some time during 1974-75 have attended school on less than one-third of the school days during the current school year, suggesting paper projections for next year of a tighter fit between seats and students than may materialize in the classroom. It is not expected that any condition of overcrowding at the elementary or middle level will occur.

However, if overcrowding or other problems due to inadequate space should develop, they may not be solved by using unsuitable space such as hallways, utility rooms, auditoriums and the like. If need be, one or more schools that the plan states shall be closed may be reopened. It is the plan's purpose that no elementary or middle school student will have to attend school outside the community school district of his residence unless that is the student's or parent's preference. The court's decisions as to assignment processes, school closings and capacities which have been incorporated in the plan have all been controlled by this goal.

As many as 55 of the approximately 167 school facilities in Boston have been recommended for closing or replacement by various agencies. Closing schools is always a difficult decision, especially since some schools whose location and physical condition compel their closing have promising educational programs. Attempts have been made to close schools that are in poor condition or unsafe in both black, other minority and white areas to avoid burdening any one group unfairly. We find that on the basis of the factors discussed, the closing of each of the twenty schools listed in the plan is warranted.

G.

Magnet Schools and Programs

At present Boston has a number of schools with distinctive or magnet programs attracting students from throughout the city. At the high school level these schools include

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Boston High School, Boston Latin Academy, Boston Latin School, Boston Technical School, Boston Trade, Copley Square, and the Occupational Resource Center. Additional citywide schools with distinctive programs have been added by the plan. To assist the Boston school system in developing the new magnet programs and also in improving the quality of education throughout the school system, the plan adopts the concept of pairing of colleges and universities with particular schools developed by the masters. Twenty colleges and universities have been paired with particular schools in both citywide and community school districts, and collaborative efforts have already begun with the assistance of an ad hoc committee of attorneys appointed by the court. Planning between the public schools and the colleges and universities is being directed toward the formulation and implementation of programs to provide distinctive, non-discriminatory educational instruction. The process of planning and developing new educational programs is a complex and continuing one. It is impossible to predict whether programs now in the planning stage will have been developed completely by the fall of this year. However, a great amount of effort is currently being expended. Funding of $900,000 for planning by colleges and universities has already been allocated by the State Board of Education, and the court, after hearing, has ordered the school committee to employ during the coming summer months teachers and administrative personnel reasonably necessary for the joint planning process. The state Secretary of Education has recommended the allocation of additional funds to assist implementation of this feature of the plan when schools open in the fall. The United States Office of Education has designated Boston as highest priority for obtaining federal Emergency School Aid Act (ESAA) funds. The Regional Director of HEW has agreed to exert every effort to obtain all possible funding for

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planning and implementing program components developed in this effort. In addition to new programs, magnet-type programs which were in existence during the 1974-75 school year will continue and in some instances will have been expanded by the time schools open in the fall.

College and university assistance will be aimed at improving and equalizing the learning outcomes of students in whatever program, school, or district the college works with. The approaches taken by the paired partners may include staff development and training, the design of instruction, materials and methods, planning or other organizational processes basic to the school or district, and concentration on community relations. The choice will depend upon a joint estimate of what is needed, and a determination of how the capabilities and interests of the college or university can best serve these needs. The court does not expect miracles or the achievement of unattainable goals within limited time constraints. The court does believe, however, that each college and university can work out one or more tangible, promising lines of educational development in company with its public school counterpart. The court appreciates the pledges of full cooperation by the colleges and universities received in writing and in meetings it has had with the presidents of the institutions of higher learning.[18] The significance of this pairing effort is as a long-term commitment, a promise to the parents and students of Boston that these institutions, with their rich educational resources, are concerning themselves in a direct way with the quality of education in the public schools.

The court adopts the masters' recommendation that contracts or memoranda of agreements be developed between the colleges and universities and the Boston public schools.

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[18] A copy of a typical letter of commitment from Suffolk University appears as Appendix C.

The court has ordered the school department to use its best efforts to negotiate a contract pertaining to each paired school acceptable to both the school committee and the contracting institution of higher learning. The superintendent has become involved personally and has appointed a coordinator to supervise exchanges of information and suggestions between the colleges and the faculty and staff at paired schools. Developing a written agreement is in itself a means of getting the parties together. Discussions now in progress may resolve such questions as scope of authority, division of responsibility, communications and control procedures, access, planning and review schedules, conditions for withdrawal by one or both parties, ownership of or editorial control over reports on projects, and other points. The contracts may identify the locus of control over different resources, whether exchanges in kind or receipt and handling of funds. In some contracts, the school department may serve as the fiscal agent and in others, the college or the State Education Department or some other third party close to the project. A contract or memorandum of agreement may also make plain those spheres in which the college would take no responsibility. The working conditions and contractual obligations of Boston teachers will be respected in these efforts. The officials of the Boston Teachers Union have supported the pairings developed by the masters.

In the court's view it is important to the success of these efforts that the agreements between individual colleges or universities and the school department be the result of negotiations by both parties, and be tailored to the particular roles settled on by the parties in each instance. Therefore, the court has refrained from mandating any form of agreement or terms that a contract must include. The importance of this effort to the success of the court's plan for desegregation of the schools and

particularly to the voluntary component of this plan, however, leads the court to reserve jurisdiction to make further orders in this area should they become necessary.

The commitments of businesses primarily through the Boston Trilateral Task Force to continue and enlarge programs of support to the schools through similar pairings, and of the Metropolitan Cultural Alliance to continue its innovative and enriching programs and focus them on aiding in the peaceful desegregation of the schools are also major contributions. From the rich resources of the Boston area, other groups, such as labor organizations, may join in planning programs with the schools, possibly through pairings like those established in the plan. A committee of the Boston Bar Association is making continuing efforts to aid in developing institutional support. The efforts of so many people to enrich public education in such diverse and promising ways will help ease the transition of Boston's school system from a dual system to one with no "black" schools or "white" schools, but just schools.

H.

Citizen Participation, Monitoring and Reporting

The court adopts with some modifications the masters' recommendations for the establishment of a Citywide Coordinating Council with responsibility for monitoring implementation of the court's desegregation orders, and for community District Advisory Councils that provide a structure for community participation. The court has related to these new groups the racial-ethnic councils of parents and students citywide and at each impacted school which were established by orders entered in 1974. The court endorses, as did the masters, the continued independent service of the Home and School Associations, the Citywide Educational Coalition and other groups working

to enhance the quality and equality of education in the public schools of the city.

Proposals for some court-established method of citizen participation and monitoring were put forward and supported by the parties as early as August of 1974. On October 4, 1974 the court issued an order, which all the parties had a part in drafting, establishing racial-ethnic parent and student councils ("RPCs and RSSs") at many schools, to deal with racial tensions and problems at the individual school level. A citywide parents' advisory council ("CPAC") was established to coordinate activities and disseminate information among school RPCs.

The establishment of a citywide group of citizens charged with informing the community and monitoring implementation of the court's orders regarding desegregation has been supported by most, if not all, of the parties. In the fall of 1974, the Community Relations Service (CRS) of the United States Department of Justice prepared at the request of the court a report on the structure, function and success of the court-appointed citizens' committee in Denver, and on those in a number of other cities operating under desegregation orders.

Based on the information gathered by the CRS, the court finds that a citywide coordinating council of approximately 40 members will form a broad-based group whose membership will reflect the richness of Boston's human and community resources. Use of a committee structure such as exists in the Denver model will enable efficient and effective functioning of the council despite the large number of members.

The court also adopts the masters' recommendation for the establishment of district advisory councils. Each district council will have a membership of ten parents, out of a maximum of 20 members. The size of the council can vary to include representatives of community groups and

other agencies active in public school education in the particular district. RPCs and RSCs will provide a logical represenative route to fill the parent and student seats on the district councils: the plan provides that parent and student district council members be selected by members of RPCs and RSCs. Elections of RPCs and RSCs are open to all parents of students attending school and to all attending students. The previously established racial and ethnic compositions of RPCs and RSCs will ensure that parental and student representation on district councils will be racially and ethnically diverse, without the need to set further racial and ethnic quotas.

Numerous cases provide support for the establishment of biracial and multiracial groups to act as advisory and monitoring bodies during the desegregation process, e.g., *Singleton* v. *Jackson Municipal School District*, 5 Cir. 1970, 426 F.2d 1364; *Keyes* v. *School Dist. No. 1, Denver, Colo.*, D. Colo. 1974, 380 F.Supp. 673. The structure established here will aid in the accomplishment of peaceful and constructive desegregation of the schools.

As a method of informing the court of the progress of desegregation in the school system, we have adopted the masters' recommendation and require the filing of annual reports by the Superintendent. The information required includes data suggested by the masters as a part of these reports, as well as other information required in other desegregation cases such as those in Denver and in Jackson, Mississippi.

The masters' recommendation that the school department file a report on the design and implementation of a uniform disciplinary code has not as yet been acted upon. The court is, of course, concerned with the nondiscriminatory enforcement of discipline in the schools and with the due process rights of all students. See *Wood* v. *Strickland*, U.S. , Feb. 25, 1975, 43 U.S.L.W. 4293; *Goss* v. *Lopez*,

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U.S. , Jan. 22, 1975, 43 U.S.L.W. 4181. However, because of the pendency of motions filed by the Children's Defense Fund and others concerning student discipline, this matter will be the subject of separate future hearings and orders.

IV

Conclusion

The student desegregation plan ordered by the court for Boston's public schools is a complex design. A network of citywide magnet schools with distinctive features and particular assignment guidelines has been combined with the division of the city into geographically bounded school districts. Within these districts assignments to schools are governed by separate, yet interdependent guidelines. The assignment process calls for parents' and students' choices of educational programs to be considered individually and granted where possible consistently with desegregation. Consideration of dozens of special programs and problems is reflected in the many specific provisions of the plan. Particular provisions deal with assignment of kindergarteners, high school seniors, students now in vocational education programs, attendance at the examination schools, students requiring bilingual education or special needs attention, and students receiving Title I services.

Colleges, universities, businesses and cultural institutions have accepted invitations to work along with the school department to develop programs in citywide and district schools that will be educationally sound and attractive, and to expand and improve existing programs. A network of organizations for citizen participation and monitoring will be established. Racial Ethnic Councils of parents and of students will meet at the individual school level and representatively in a Citywide Parents Advisory Council. There will be Community District Advisory Councils in every school district where parents, students, school staff and

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others involved in education in that district can meet to discuss the educational needs of the district and to monitor the peaceful desegregation of the district's schools. A City-wide Coordinating Council composed of members of core city communities and of the Greater Boston business and educational community will monitor and work for peaceful desegregation of the schools under the court's orders.

The plan does not order the involvement of Boston's suburbs in the desegregation remedy. As of this date, there has been no factual showing that "racially discriminatory acts of the state or local school districts [i.e., school systems], or of a single school district have been a substantial cause of *interdistrict* segregation" (emphasis added), the legal basis outlined by the Supreme Court in *Milliken* v. *Bradley,* 1974, 418 U.S. 717, 745, as necessary before any formulation of an interdistrict remedy. A motion by the Mayor addressed to this issue has been briefed by the parties and awaits future hearing. However, the court encourages the continuation of the voluntary, cooperative efforts being made in programs involving suburban and Boston schoolchildren.

The timetable in the court plan sets forth the numerous important steps that must be completed before desegregated schools can receive students next fall. This list is incomplete, as it must be. No specific orders could cover all the planning and activities that must take place in many areas, from magnet programs to building renovations to contracts for transportation to security measures to training of teachers and staff, etc., in order to fully implement the plan.

The cooperation and efforts of persons not parties in this case will also be needed. The training and sensitivity of Boston's teachers to the human problems attending desegregation, and their energy in developing magnet programs and devising non-discriminatory curricula will be

essential. Parents are asked to become involved in choosing among educational programs for their children and in serving on the various councils that will deal with the conflicts and problems which are inevitable in the desegregation process. The indispensable collaboration of paired colleges, universities and businesses has been discussed at length. City and state agencies will be called on for expertise and assistance in the conversion and construction of facilities, the provision of safety and security for students in and out of school, the financial requirements of desegregation, the development of magnet educational programs and in other areas.

The plan and the demands of its implementation on the people of Boston are necessarily as diverse and complex as the needs and characteristics of the city's public schools. The extent to which it will succeed in desegregating the public schools and improving the quality of education given in them remains to be seen. One thing, however, seems clear: the education of a generation of Boston students is at stake. It is the students in the schools who will be directly and permanently affected by the way the citizens of Boston carry out the plan.

(s) W. Arthur Garrity, Jr.
United States District Judge

V

STUDENT DESEGREGATION PLAN

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Introduction

The student desegregation plan which follows is intended eventually to be Part V of a filing entitled Memorandum of Decision and Remedial Orders. Other parts will include discussions of applicable rules of law, findings and conclusions underlying provisions of the plan, further particulars of the court's retention of jurisdiction, and several appendices. However, the deadline for establishing a final student desegregation plan has arrived if time is to be available for the city defendants and persons who are not parties to these proceedings to do the many things which must be done before the opening of schools next fall. Hence the accompanying plan is filed before other parts of the court's decision, which will follow as soon as possible, probably within two weeks.

May 10, 1975

As indicated on the previous page, the student desegregation plan which follows as Part V was originally filed separately on May 10, 1975. For this printing, some details of the plan relating to specific facilities have been amended to correct inadvertent omissions and to reflect developments in the use of certain buildings that have grown out of discussions between school department officials and the court-appointed experts.

June 6, 1975

A. The Community School Districts

Definition and Purposes

A Community School District is an area of the city, clearly bounded by identifiable lines on a map, within which all residents are entitled to attend the public schools in that area, as seat capacities may allow. Maps, geocodes and facilities tables of the eight community districts appear *infra*, on page 9. The purposes of these Districts are: (a) To accomplish desegregation of the schools in conformance with constitutional principles; (b) To correlate

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the programs and operations of public educational services with the needs and interests of residents and students within a natural unit or combination of units of the residential communities of Boston; (c) To enable parents and students to plan a coherent sequence of learning experiences within an identifiable series of schools that culminate in Community District High Schools; (d) To minimize the costs and burdens of transporting students, staff, and material between distant points in the city; and (e) To utilize existing facilities fully and efficiently.

No Community District boundary shall be modified except on notice to the parties with the review and approval of the court. Community District schools shall be equal in quality and status in all respects to Citywide schools and programs. No teacher or school administrator in a Citywide school may remand a student to a district school as unsuitable for the Citywide school or as a punishment. Neither may schools in any Community District develop alternative programs which operate *de facto* as preventive detention or short-term segregation facilities. There shall be no segregation of students within schools, classrooms, or programs in the school system.

Administration

The city defendants shall forthwith appoint, or transfer from an existing Area Superintendency, a Community Superintendent as the chief school officer for each Community District. Each Community Superintendent shall report to the Superintendent or his Deputy and shall also consult with and be advised regularly by a Community District Advisory Council. Such Councils are established by the section of this plan entiled "Citizen Participation, Monitoring and Reporting". Each Community District school facility shall, before July 1, 1976, be administered by an administrator at the rank of principal or headmaster. Selection of all administrators is subject to future

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orders of the court on the desegregation of administrators, as to which plaintiffs filed a comprehensive proposal and memorandum on May 7, 1975. Principals and headmasters in each Community District shall constitute an administrative cabinet to be known as the Council of Principals, which shall be chaired by the Community Superintendent.

Each Community District shall maintain a District Office that is located in a school facility within easy reach of all residents. The Office shall contain the Community Superintendent, a secretary for staff support of Community District Advisory Councils, and a professional staff charged with district-wide servicing of ancillary and support programs. The District Office shall also be the meeting place and facility for use by members of the Community District Advisory Council, the Council of Principals, and of Racial-Ethnic Parents' Councils.

Curriculum and Grade Structure

Within the limits established by state standards, the policies of the School Department, and contractual obligations entered into with a paired college or university, each Community School District shall develop its curriculum and programs of instruction and extra-curricular activities in response to the needs and interests of the parents and students resident within the District, so that programs are non-discriminatory and inclusive of all ethnic groups. All extra-curricular activities and athletic programs shall be available and conducted on a desegregated basis. These responses shall be coherent from grade to grade and from school to school. Programs of instruction at all levels shall be planned to reinforce the quality of learning within the District High School. Each high school shall be a four year, comprehensive institution which serves with equal and uniform excellence of instruction, students seeking general culminating education, those seeking vocational training or experience, and those seeking

preparation for post-secondary study. Each District High School shall also serve as an Adult or Multipurpose Community Education facility.

Community District school grade structures shall be uniform. Schools shall be 1-5 at the elementary level, 6-8 at the middle school level, and 9-12 at the high school level. They may enroll 13th graders. Most but not all elementary schools shall contain kindergartens. Kindergarten assignments shall be made by the School Department [1] to appropriate facilities, and may include inter-district assignments. Kindergarten classes shall be desegregated wherever possible. If kindergarten students must be assigned to schools outside their home neighborhoods, the assignments shall be made in accordance with two principles: (1) The resulting student bodies shall be desegregated, and (2) the burdens of distance and transportation shall be distributed equitably across ethnic groups.

Bilingual Students

Schools where bilingual programs shall be provided are shown in the school tables which are part of this plan. Where 20 or more kindergarten students attend a school and are found to be in need of bilingual instruction, the School Department shall provide it. Parents who seek bilingual instruction for their children at any grade level shall note this on the enrollment application form which the School Department shall mail to them. However, the School Bilingual Department staff shall make the decision to *assign* students to programs, but not to specific schools within Community Districts. Bilingual program assignments will be the first made by the Assignment Unit.

Special Needs Students

Every school facility shall receive and educate mild

[1] The words "School Department" refer collectively and individually to the members of the Boston School Committee and Superintendent and their agents, servants, employees and attorneys and all other persons under their control.

and moderate special needs students, who will be assigned to schools in accordance with regular assignment procedure by geocode. No less than one resource room and one special needs services space shall be set aside in each school. Each school shall have special educators and materials. Some moderate and severely handicapped students will be assigned directly to schools with special facilities and staff, apart from the geocode procedure. To support special education both in regular schools and in special resource schools, at least three such special schools in each community district shall be identified and planned by the School Department, for review by representatives of the court, not later than July 15, 1975. No special school shall consist wholly or primarily of special needs students.

Capacities and School Closing

Every school facility shall house a student body that does not exceed the total capacity ceiling shown in the tables in the plan in order to avoid overcrowding and enable objective assignment by geocode units. The capacity ceiling makes no distinction between the variable seat requirements for kindergarten, special needs, bilingual, and vocational programs. This must be left to the planning discretion of the School Department. The ceiling capacity figure need not be met in any particular school, to enable this planning for program differences. The ceiling capacity limit is in no way prescriptive with respect to setting or influencing variable standards for establishing class size or teacher/student ratios.

The School Committee is ordered to close permanently the following schools,[2] not later than August 30, 1975, in

[2] The decisions to close these facilities were made after consideration of their locations in areas with excess seating capacity at the elementary level, of their conditions and presence on various lists of schools recommended for closing in the past, and of equity in the burden of school closings among districts and among ethnic groups.

order to enable and maintain desegregation through the consolidation of student bodies:

1. W. Allston
2. Andrew
3. Bacon
4. J. Bates
5. M. Baker
6. Burnham
7. Cushing
8. Dean
9. Dillway
10. Ellis Annex
11. Hamilton Annex (Rental)
12. Hart
13. Hoar
14. Howe
15. Logue
16. Longfellow
17. L. Mason
18. Tilston
19. Tobin Annex
20. Wolcott
21. Dudley
22. (old) Quincy

The Longfellow and Dudley may be used for kindergarten classes, if the school committee chooses.

The following facilities which the school committee has closed shall remain closed and not be rehabilitated:

1. Ira Allen
2. C. Gibson
3. N. Hawthorne
4. Leen
5. Minot
6. C. Perkins
7. Savin Hill
8. Stewart
9. Trade High for Girls
10. John J. Williams

Maps, Tables, and Planning Specifications

The following maps show the boundaries, official names, and geocode units included within each of the eight Community School Districts. The base map was drawn some time ago and shows some schools now closed and others to be closed. A geocode is a bounded area of from five to fifteen residential blocks within a District and may contain anywhere from a half dozen to several hundred public school students. The geocodes were originally developed as reporting units for use by the Boston Police Department and are now used by the School Department for

planning purposes. In this plan, they shall provide the basis for assigning students to schools.

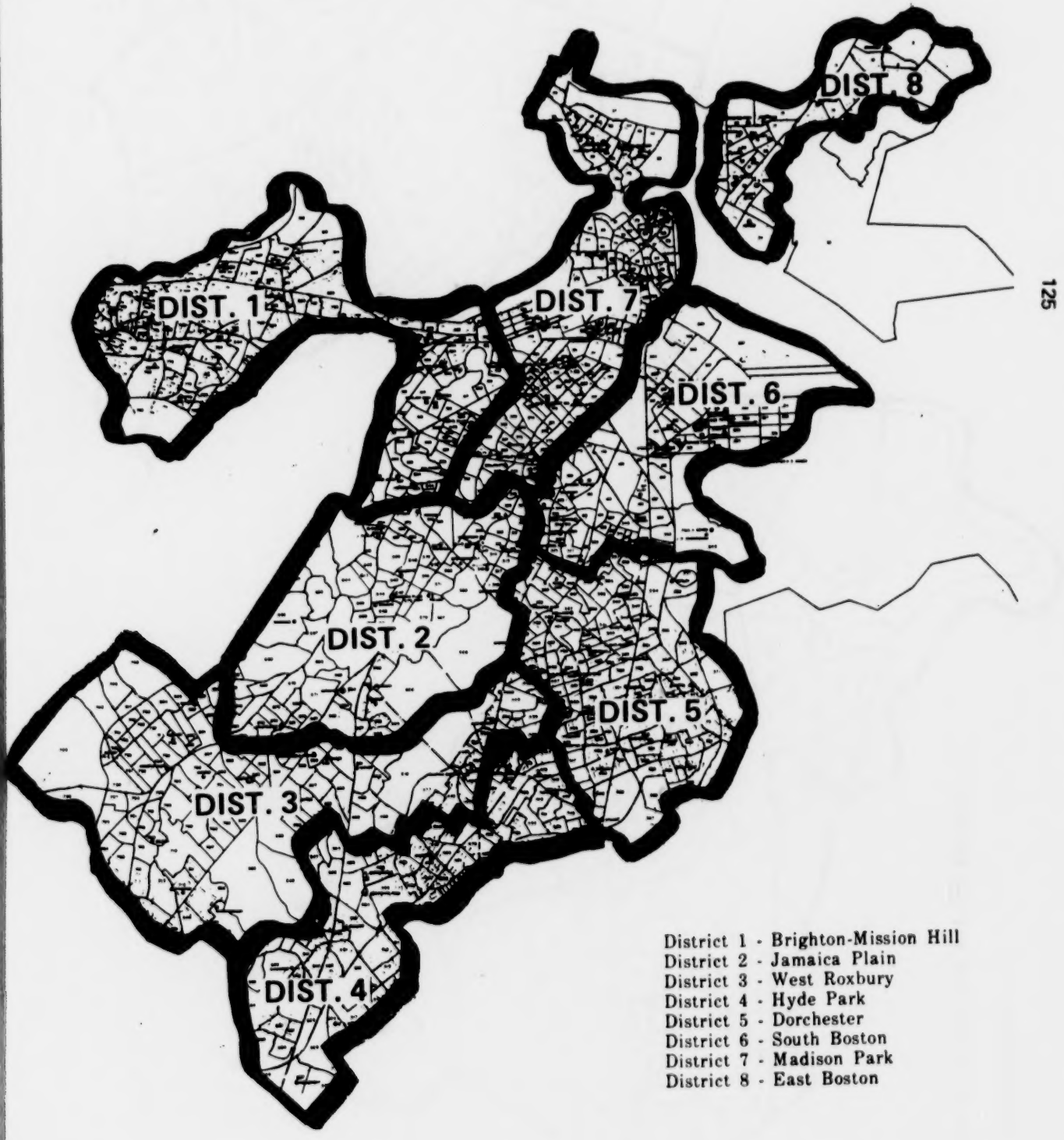
One table accompanying the map of each Community School District lists the school facilities for the District, together with the limit on capacity for each facility, the designation of numbers of students to be accommodated in bilingual program clusters within particular schools, and, in the lower right hand corner, the total available seats at each level. A second table summarizes the population composition of students residing in the District who are enrolled in public schools as of April 10, 1975. The bottom line states the racial and ethnic composition of the Community District to which the percentage variations permitted by the guidelines for assigning students relate. Following the tables is a summary of planning specifications for each District.

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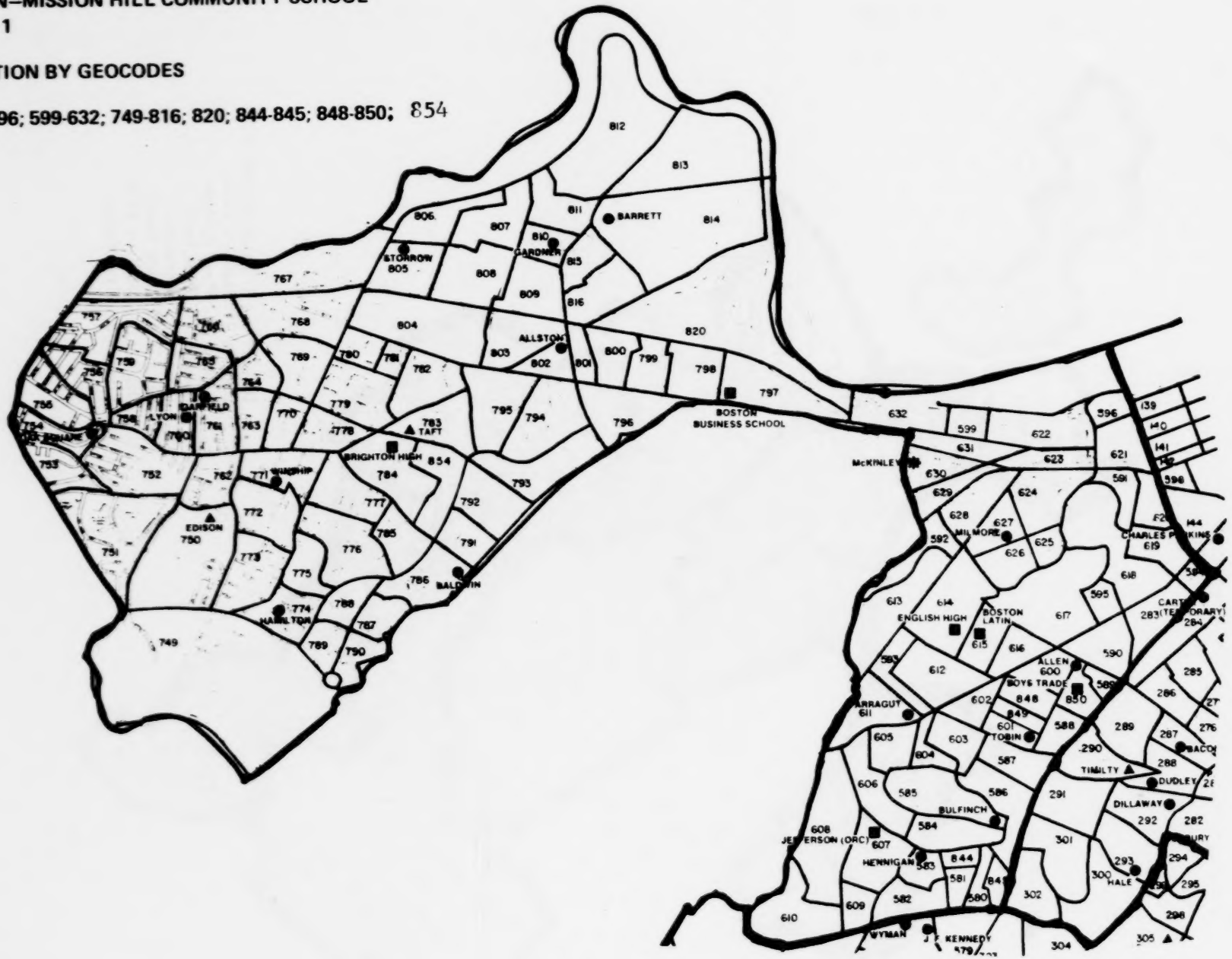
District 1 - Brighton-Mission Hill
District 2 - Jamaica Plain
District 3 - West Roxbury
District 4 - Hyde Park
District 5 - Dorchester
District 6 - South Boston
District 7 - Madison Park
District 8 - East Boston

125

BRIGHTON–MISSION HILL COMMUNITY SCHOOL
DISTRICT 1

COMPOSITION BY GEOCODES

283; 580-596; 599-632; 749-816; 820; 844-845; 848-850; 854



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Table 1.

BRIGHTON–MISSION HILL COMMUNITY SCHOOL DISTRICT 1.

School	Limit on Capacity	No. Bilingual Students	
1. Brighton High	1200	Chinese	100
		Hispanic	120
2. Edison Middle	750	Chinese	60
		Hispanic	100
3. Taft Middle	850		
4. Baldwin	400		
5. Barrett	180		
6. Farragut	290	Hispanic	40
7. Gardner	550	Hispanic	100
8. Garfield	450		
9. Hamilton	380	Chinese	60
10. Lyon	200		
11. Oak Square	130		
12. Storrow	100		
13. McKinley	130	Hispanic	40
14. Milmore	190	Hispanic	40
15. Tobin	630	Hispanic	100
16. Winship	460	Hispanic	100

High School Total	1200
Middle School Total	1600
Elementary School Total	4090
TOTALS	6890

BRIGHTON–MISSION HILL DISTRICT 1
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	572	234	289	1095	—	52	22	26
1 – 5	1345	1366	923	3634	—	37	38	25
6 – 8	789	641	388	1818	—	43	35	22
9 – 12	1188	677	410	2275	—	52	30	18
13	119	24	69	212	—	56	11	33
K – 13 Total	4013	2942	2079	9034	—	44	33	23

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

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Planning Specifications
for
Brighton-Mission Community School District

1. Approximately one-half of the resident high school students will need Citywide high school admissions or assignments.

2. The McKinley School shall be converted to a general elementary school from its present exclusive use for trainable and educable retardates of middle and high school age. So that no hardship is created for McKinley's present students, however, this change shall be gradual and phased so that current students may complete the program. A plan for accomplishing this shall be filed with the Court representatives not later than August 1, 1975. The plan shall include identification of future facility provisions for retarded youths.

3. The Taft Elementary School shall be converted for use as part of the Taft Middle School.

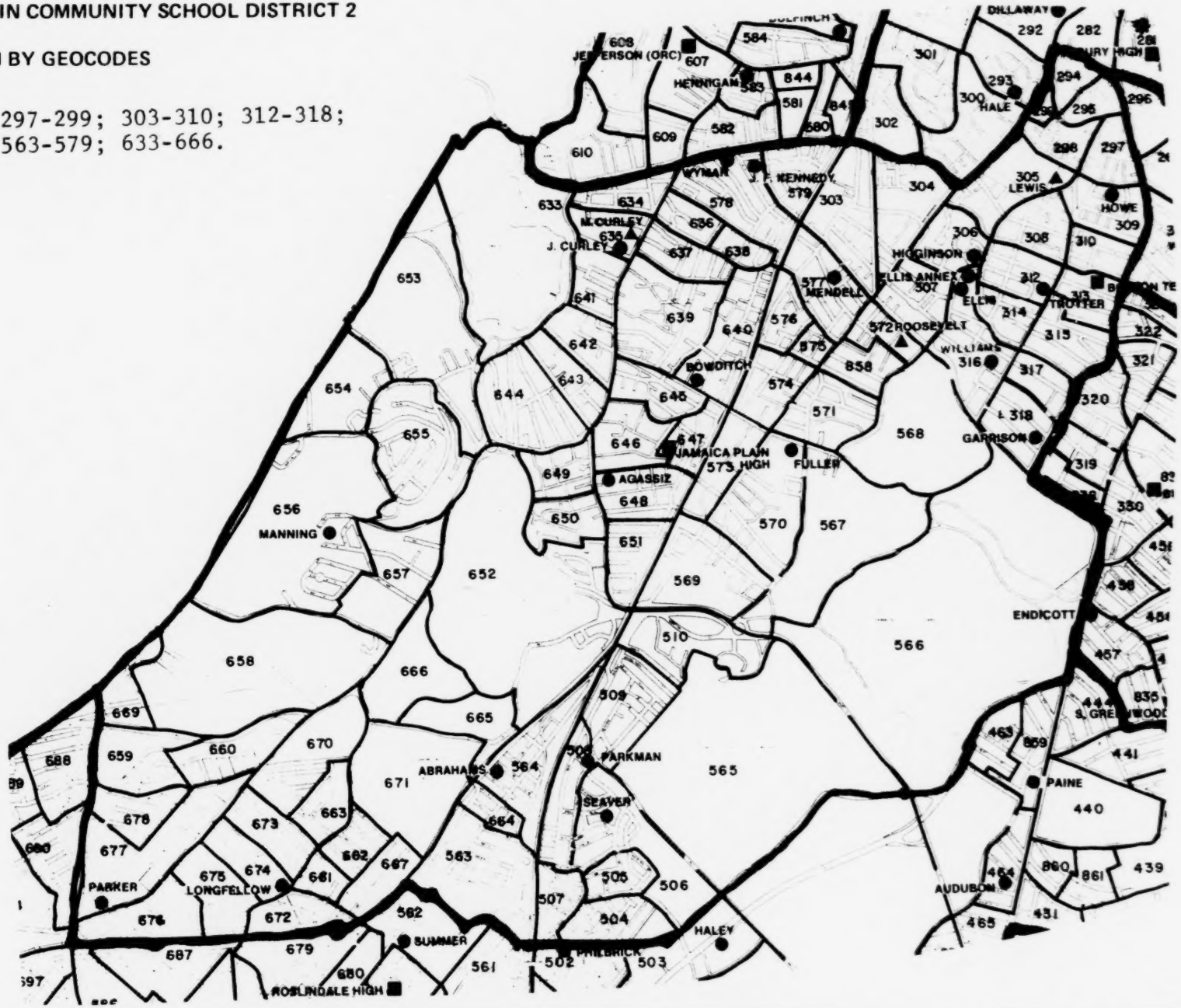
4. Twenty-five percent of the seats in the Jackson portion of the Citywide Jackson-Mann School, in Hennigan School, Boston Trade High School and English High School shall be reserved for residents of this District.

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JAMAICA PLAIN COMMUNITY SCHOOL DISTRICT 2

COMPOSITION BY GEOCODES

294-295;297-299; 303-310; 312-318;
504-510;563-579; 633-666.



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Table 2.

JAMAICA PLAIN COMMUNITY SCHOOL DISTRICT 2.

School	Limit on Capacity	No. Bilingual Students	
1. Jamaica Plain High	750	Hispanic	130
2. T. Roosevelt Middle	500	Hispanic	80
3. M. Curley Middle	1100	Hispanic	120
4. Lewis Middle	500		
5. Agassiz	800	Hispanic	60
6. Bowditch	350	Hispanic	100
7. Ellis	540	Hispanic	60
8. Fuller	300		
9. Higginson	310		
10. J. F. Kennedy	550	Hispanic	120
11. Manning	230		
12. Mendell	290	Hispanic	80
13. Wyman	220		
14. Seaver	300		
15. Parkman	440		
16. Garrison	700		
17. Abraham	220		
18. Parker	100		

High School Total	750
Middle School Total	2100
Elementary School Total	5350
TOTALS	8200

JAMAICA PLAIN DISTRICT 2
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	744	410	202	1356	—	55	30	15
1 – 5	1585	1685	675	3945	—	40	43	17
6 – 8	861	855	301	2017	—	43	42	15
9 – 12	1216	954	299	2469	—	49	39	12
13	71	35	37	143	—	50	24	26
K – 13 Total	4477	3939	1514	9930	—	45	40	15

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

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Planning Specifications
for
Jamaica Plain Community School District

1. A new Jamaica Plain High School also known as Southwest II, shall be built in 1977 to replace the present facility. Until then, about two-thirds of the District's resident high school students will need Citywide high school admissions or assignments.

2. Twenty-five percent of the seats in Citywide elementary schools J. Curley and Trotter are reserved for residents of this District.

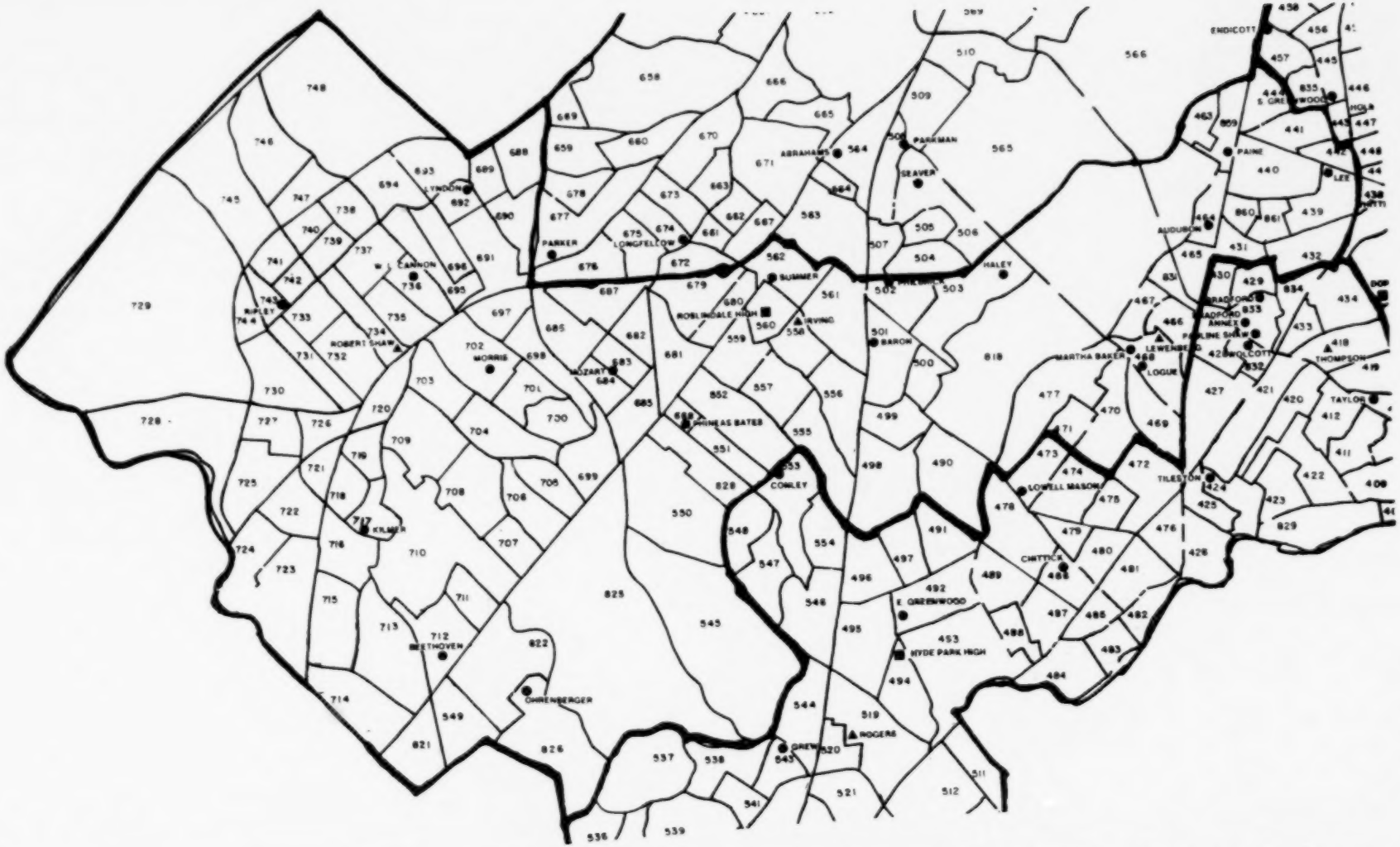
3. The Longfellow school may be used for kindergarten classes if the school department finds such use necessary.

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WEST ROXBURY COMMUNITY SCHOOL DISTRICT 3

COMPOSITION BY GEOCODES

431-432; 439-442; 444; 463-471; 477; 490; 498-503; 545; 549-552; 555-562; 668; 679-748; 818; 821-822; 825-826; 828; 831; 859-861.



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Table 3.

WEST ROXBURY COMMUNITY SCHOOL DISTRICT 3.

School	Limit on Capacity	No. Bilingual Students	
1. Roslindale High	1020	Greek	60
2. Irving Middle	1040	Hispanic	60
		Greek	40
3. Lewenberg Middle	900	French	
		Haitian	60
4. Shaw Middle	800		
5. Barron	260		
6. P. Bates	360		
7. Beethoven	410		
8. Cannon	230		
9. Kilmer	360		
10. Lydon	310	Greek	60
11. Morris	400		
12. Mozart	330		
13. Philbrick	200		
14. Ripley	400		
15. Sumner	600		
16. Audubon	260		
17. Lee	1000	Hispanic	140
18. Paine	490		

High School Total	1020
Middle School Total	2740
Elementary School Total	5610
TOTALS	9370

WEST ROXBURY DISTRICT 3
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	1096	604	69	1769	—	62	34	4
1 – 5	2439	2191	236	4866	—	50	45	5
6 – 8	1483	1081	114	2678	—	55	40	5
9 – 12	1987	1115	91	3193	—	62	35	3
13	166	29	9	204	—	81	14	5
K – 13 Total	7171	5020	519	12710	—	56	39	5

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

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PLANNING SPECIFICATIONS

FOR

WEST ROXBURY COMMUNITY SCHOOL DISTRICT

1. Roslindale High School can accommodate only one-third of the District's resident high school students. When Southwest I High School has been completed, 25 percent of its seats shall be reserved for residents of this District. Meanwhile, two-thirds of the students will need admissions or assignments to Citywide High Schools.

2. Twenty-five percent of the seats in Citywide elementary facilities Haley and Ohrenberger are reserved for residents of this District.

3. M. Baker and Logue Schools shall be replaced by the new Mattapan Elementary School.

HYDE PARK COMMUNITY SCHOOL DISTRICT 4

COMPOSITION BY GEOCODES

406-413; 418-430; 433-434; 472-476; 478-489; 491-497;
511-544; 546-548; 553-554; 827; 829; 832-834.

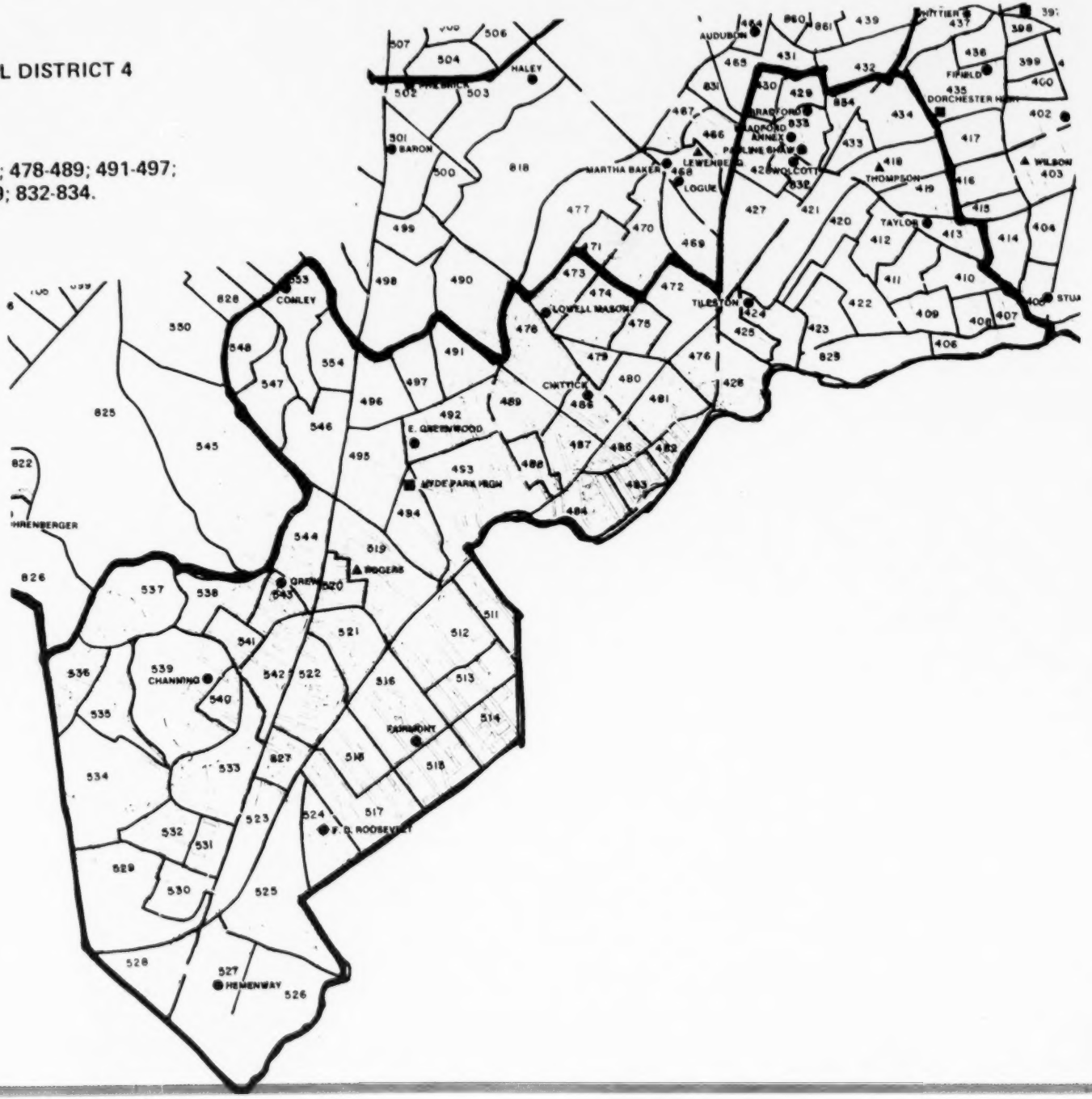


Table 4.

HYDE PARK COMMUNITY SCHOOL DISTRICT 4.

School	Limit on Capacity	No. Bilingual Students	
1. Hyde Park High	1250		
2. Rogers Middle	1000		
3. Thompson Middle	800		
4. Bradford	360	Fr. Haitian	30
		Hispanic	40
5. Bradford Annex	390		
6. Channing	490		
7. Chittick	540		
8. Conley	480		
9. Fairmount	390		
10. E. Greenwood	600		
11. Grew	420		
12. Hemenway	200		
13. F. Roosevelt	350		
14. Taylor	680		
15. P. Shaw	490		

High School Total	1250
Middle School Total	1800
Elementary School Total	5390
TOTALS	8440

HYDE PARK DISTRICT 4
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	851	408	36	1295	—	66	32	2
1 – 5	1950	1358	100	3408	—	57	40	3
6 – 8	885	623	56	1564	—	56	40	4
9 – 12	1734	773	67	2574	—	67	30	3
13	92	30	9	131	—	70	23	7
K – 13 Total	5512	3192	268	8972	—	61	35	4

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

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Planning Specifications
for
Hyde Park Community School District

1. About half of the resident high school students will need Citywide high school admissions or assignments.

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DORCHESTER COMMUNITY SCHOOL DISTRICT 5

COMPOSITION BY GEOCODES

247-255; 257; 319-323; 326; 328-330; 332-405; 414-417; 443; 435-438; 445-462; 817; 819; 823; 830; 835-841.



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Table 5.

DORCHESTER COMMUNITY SCHOOL DISTRICT 5.

School	Limit on Capacity	No. Bilingual Students	
1. Burke High	1100		
2. Dorchester High	1550	Haitian French	100
3. Champlain Middle	320		
4. Cleveland Middle	1100	Hispanic	100
5. Holmes Middle	600	Hispanic	80
6. Wilson Middle	1050		
7. P. Brooks	340		
8. Dickerman	350		
9. Endicott	310		
10. Everett	490	Hispanic	80
12. Fifield	590		
13. S. Greenwood	800		
14. Holland	1000	Hispanic	80
15. Kenney	420		
16. Marshall	1000	Hispanic	100
17. Mather	800	Hispanic	80
18. Murphy	1000	Hispanic	60
19. Motley	360		
20. O'Hearn	310		
21. Richards	230		
22. Rochambeau	410		
23. Stone	350		

High School Total	2650
Middle School Total	3070
Elementary School Total	8760
TOTALS	14480

DORCHESTER DISTRICT 5
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	1272	926	141	2339	—	54	40	6
1 – 5	2843	3537	584	6964	—	41	51	8
6 – 8	1504	1804	225	3533	—	43	51	6
9 – 12	1951	1959	220	4130	—	47	48	5
13	158	63	27	248	—	64	25	11
K – 13 Total	7728	8289	1197	17214	—	45	48	7

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Planning Specifications
for
Dorchester Community School District

1. About 44 percent of the resident high school students in this District will need admissions or assignments to Citywide High Schools. Whittier shall continue as a Dorchester High Annex. The seat ceiling capacity shown includes this school.

2. The Champlain, Cleveland, Holmes and Wilson Middle Schools fall short of accommodating the resident middle school students in this District by approximately 460. Because a surplus of roughly 1,000 elementary seats exists at present, the School Department shall convert one or more elementary facilities for middle school use for September 1957.

3. Twenty-five percent of the seats in Citywide Hernandez and M. L. King shall be reserved for residents of this District.

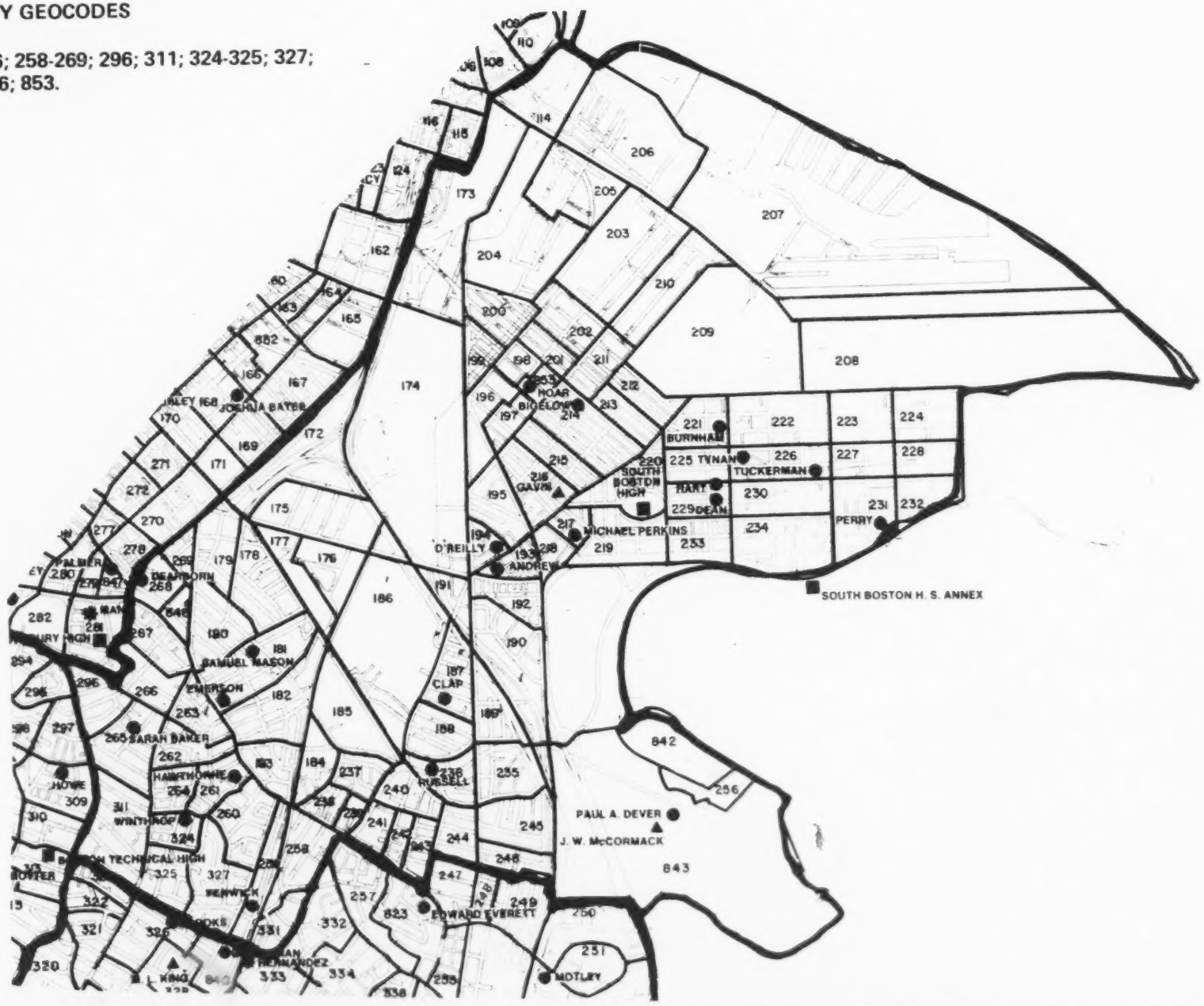
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SOUTH BOSTON COMMUNITY SCHOOL DISTRICT 6

COMPOSITION BY GEOCODES

114; 172-246; 256; 258-269; 296; 311; 324-325; 327; 331; 842; 843; 846; 853.



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Table 6.

SOUTH BOSTON COMMUNITY SCHOOL DISTRICT 6.

	School	Limit on Capacity	No. Bilingual Students	
1.	South Boston High	1100	Hispanic	80
2.	L. Street Annex	400		
3.	Dearborn Middle*	600		
4.	Gavin Middle	1100		
5.	McCormack Middle	900	Hispanic	100
6.	Bigelow	520		
7.	Clap	350		
8.	(New) Condon	1000		
9.	Dever	700	Hispanic	100
10.	Emerson	260	Hispanic	60
			Portuguese	40
10A.	Fenwick	340	Hispanic	40
11.	S. Mason	300	Hispanic	60
12.	O'Reilly	360		
13.	Perkins	400		
14.	Perry	440		
15.	Russell	550		
16.	Tuckerman	280		
17.	Tynan	570		
18.	Winthrop	380	Hispanic	60

* Includes Dearborn Annex

High School Total	1500
Middle School Total	2600
Elementary School Total	6150
TOTALS	10250

SOUTH BOSTON DISTRICT 6
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	920	339	220	1479	—	62	23	15
1 – 5	2510	1560	867	4937	—	51	32	17
6 – 8	1028	903	312	2243	—	46	40	14
9 – 12	1460	941	234	2635	—	56	36	8
13	148	28	44	220	—	67	13	20
K – 13 Total	6066	3771	1677	11514	—	53	33	14

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

BLEED THROUGH

PLANNING SPECIFICATIONS

FOR

SOUTH BOSTON COMMUNITY SCHOOL DISTRICT

1. About 43 percent of the resident high school students in this District will need admissions or assignments in Citywide High Schools.

2. The Gavin and J. McCormack Middle Schools fall short of the seat requirements for this District. Therefore, the School Department shall convert Dearborn for middle school use with Dearborn Annex, now a middle school by September 1975.

3. Depending upon their geocoded residence, Hispanic special needs students currently assigned to the Fenwick School shall be assigned to the M. L. King and the J. McCormack Middle Schools.

4. The use of the Sarah Baker facility will be determined by the school department subject to review of the court-appointed experts.

BLEED THROUGH

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MADISON PARK COMMUNITY SCHOOL DISTRICT 7

COMPOSITION BY GEOCODES

37-113; 115-171; 270-282; 284-293; 300-302; 597-598; 846-847; 851-852.



BLEED THROUGH

Table 7.

MADISON PARK COMMUNITY SCHOOL DISTRICT 7.

School	Limit on Capacity	No. Bilingual Students	
1. Charlestown High	700		
2. Roxbury High	850	Chinese	80
		Hispanic	80
3. Blackstone Middle	400		
4. Edwards Middle	670		
5. Michelangelo Middle	350	Chinese	80
		Italian	40
6. Timilty Middle	700	Hispanic	100
7. Bancroft	230		
8. Blackstone	800	Hispanic	100
9. Bunker Hill	150		
10. Carter	210		
11. Eliot	430	Italian	80
12. Faneuil	270		
13. Hale	300	Hispanic	60
14. Holden	150		
15. Hurley	470	Hispanic	60
16. Kent	600	Chinese	60
17. Lincoln	700	Hispanic	100
18. Palmer	200		
19. Prince	300		
20. Quincy (New)	800	Chinese	160
21. Warren-Prescott	520		

High School Total	1550
Middle School Total	2120
Elementary School Total	4930
TOTALS	8600

MADISON PARK DISTRICT 7
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	519	334	285	1138	—	46	29	25
1 – 5	1356	1423	1065	3844	—	35	37	28
6 – 8	792	781	516	2089	—	38	37	25
9 – 12	1133	857	498	2488	—	46	34	20
13	65	26	122	213	—	31	12	57
K – 13 Total	3865	3421	2486	9772	—	40	35	25

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

FILED THROUGH

PLANNING SPECIFICATIONS
FOR
MADISON PARK COMMUNITY SCHOOL DISTRICT

1. The Roxbury and Charlestown High Schools together can accommodate about 62 percent of the District's resident high school students. Therefore, about 38 percent will need admissions or assignments to Citywide High Schools. Charlestown High is to be replaced with a new facility in 1977.

The vocational education staff at Charlestown High shall make special efforts to recruit and admit black and other minority students into the program, beginning with 1975-76 enrollments.

2. The Edwards, Michelangelo, and Timilty Middle Schools fall 400 seats short of the needs for this District. Therefore if the Blackstone is not ready for use in September 1975, the school department shall propose one or more elementary facilities for conversion to middle school use on an interim basis, for the review of the court experts.

3. Twenty-five percent of the seats in Citywide Boston High School, Copley Square High School, Madison Park High School, Madison Park Temporary High School, and the Mackey Middle School, shall be reserved for residents of this District.

4. In order to consolidate this District for purposes of desegregation, various bilingual programs now ongoing in schools outside this District but serving its residents have been deliberately assigned to schools in this District.

5. The new Quincy School will not be ready for occupancy until September, 1976. It will occasion the closing of an additional elementary facility in the District on that date. Until then, the Chinese bilingual program shall be located in a school selected by the Bilingual Department. The old Quincy facility shall be closed permanently for

school use. However, the timing of closing shall be proposed by the school department for review by representatives of the court. It may be used for a time, pending completion of the new Quincy School.

6. The Dudley School shall be used for kindergarten classes only, or an alternative kindergarten site in its neighborhood may be proposed for review of the court experts.

7. The new Carter shall be constructed promptly and shall include an elementary and a middle school facility.

8. The Spencer building and the Boys Club may be used as auxiliary facilities at Charlestown High.

9. The Bancroft School shall continue its ungraded program for students up to 13 years of age.

BLEED THROUGH

EAST BOSTON COMMUNITY SCHOOL DISTRICT 8

COMPOSITION BY GEOCODES

1-36; 824; 855-857.



BLEED THROUGH

Table 8.

EAST BOSTON COMMUNITY SCHOOL DISTRICT 8.

School	Limit on Capacity	No. Bilingual Students	
1. E. Boston High	1350	Italian	150
2. (Old) Barnes Middle	750	Italian	60
3. Adams	350		
4. Allighiere	170	Italian	40
5. Bradley	340		
6. Chapman	320		
7. Cheverus	390		
8. Lyman	260		
9. O'Donnell	290		
10. Otis	420		
11. P. Kennedy	400		
12. Sheridan	310		

High School Total	1350
Middle School Total	750
Elementary School Total	3250
TOTALS	5350

EAST BOSTON DISTRICT 8
1974-75 STUDENT ENROLLMENTS[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	704	19	29	752	—	94	2	4
1 – 5	2049	64	62	2175	—	94	3	3
6 – 8	1106	31	27	1164	—	95	3	2
9 – 12	1541	46	19	1606	—	96	3	1
13	61	2	7	70	—	87	3	10
K – 13 Total	5461	162	144	5767	—	95	3	2

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

BLEED THROUGH

PLANNING SPECIFICATIONS
FOR
EAST BOSTON COMMUNITY SCHOOL DISTRICT

1. In September, 1976, East Boston High School shall become Citywide District East Boston Technical High School. At that time, 25 percent of the seats in that facility shall be reserved for residents of the District.

Staff in the vocational program at East Boston High School shall make special efforts to recruit black and other minority students for enrollment in their program, effective September, 1975.

2. If the old Barnes Middle School enrollment from within this District exceeds 750 in any one year, arrangements for temporary middle school classes may be devised in one or more of the District elementary facilities.

3. The Daniel Webster School shall be used for continuing and community education and recreation purposes only.

4. The new Barnes Middle School, and the Guild and McKay facilities — all part of Citywide School District 9 — shall reserve 25 percent of their seats for residents of District 8.

B. THE CITYWIDE SCHOOL DISTRICT

Definition and Purposes

Citywide School District 9 shall comprise those schools offering distinctive programs of instruction that may serve the needs and interests of students residing anywhere within Boston. Citywide schools range from those offering admission by examination to those targeting their services at students eligible for Title I federal aid. District 9 shall be organized like the Community School District, with a Citywide Superintendent, a District office, a Council of Principals and a Community District Advisory Council.

The purposes served by the Citywide School District are identical to those set forth for Community School Districts,

with these additions: The Citywide District shall facilitate the establishment of a substantial sector of the school system within which complete desegregation with relatively slight deviations from systemwide racial ratios is accomplished on the basis of the magnetic attraction of the programs of instruction. These programs are intended to address a wide range of needs and interests and to respond to them educationally in ways that unify all groups within the city.

The provisions of the plan contained in the previous section dealing with Community District Schools, e.g., administration, curriculum, bilingual and special needs students and capacities, shall apply equally to District 9 schools except where inconsistent with particular provisions contained in this section, e.g., the six grade stucture of Latin School and Latin Academy.

Options and Applications

The School Department shall, under the court's supervision, prepare an "Orientation and Application Booklet." The booklet shall be printed for mailing in an English and Spanish version and in a Chinese version. The English-Spanish version shall be mailed to the parents or guardians of all students enrolled in the public schools. The Chinese version shall be mailed to the parents or guardians of students identified from enrollment lists as Oriental. Translations into French, Greek, Italian and Portuguese shall be printed for distribution and copies of the booklet in these languages as well as in English-Spanish and Chinese shall be made available at local schools, Community School District offices and at other municipal locations. A statement in each language shall appear in the English-Spanish booklet mailed to parents and students informing them of the availability and location of copies in these languages. The orientation section of the booklet shall present brief but cogent descriptions of all of the schools and their pro-

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grams within Citywide District 9 and shall orient readers accurately to school resources and to the range of options and restrictions governing final assignments.

The enrollment application section shall instruct the parents or guardians of all prospective students under 18, as well as the student who is 18 or over, in how to apply for the schools and programs the student prefers. Prior to mailing the booklets, the School Department shall conduct an orientation program within the schools and through the media. The School Department shall conduct and encourage conferences and planning sessions between staff, parents, students, and civic leaders to explore and develop the full implications of magnet programs. After the booklets have been mailed, there shall be an information and guidance center located in each Community School District office to which parents and students may direct inquiries. The address and telephone number of each center shall be printed in the booklet.

The application portion shall include a request that is obligatory for responses as to student's age, ethnicity (white, black, Hispanic, Oriental, American Indian, or other); address of residence; last school and grade attended; special learning or treatment needs; Title I eligibility; home language; and other data the School Department deems essential for processing the applications. The application shall present parents and students with the following options:[3]

a. Preference for assignment to the Community School District schools with the specific school *not* named.

b. Preference for one or more specific Citywide Dis-

[3] METCO, EDCO, or similar programs shall not be offered as options, but the booklet shall inform readers of the nature of such programs and shall provide an opportunity for the parent or student to request further information about the programs.

trict schools, or programs within such a Citywide District school.

The application shall inform parents and students that all currently enrolled students (except current 12th and 13th graders) will be assigned to the extent possible on the basis of their preferences, but that if the application is not returned before the deadline for doing so or omits essential information, the student will be assigned to a school without having his or her preference considered in the initial assignment process. The application should also state that students not currently enrolled who seek to enroll for the 1975-76 school year, who do not submit an application by the deadline for doing so will be permitted to express preferences but will have to be assigned on the basis of available seats. The booklet shall inform readers that citywide magnet preferences are not guaranteed, nor is assignment to a Community District school; and that the school to which each Community District student is admitted *cannot* be identified until notification is made in writing to the parent by the School Department.

The enrollment application shall be printed in such a manner as to be detachable and returnable by prepaid mail to the School Department. Students and parents shall be given ten days in which to study, complete and mail the Application. The School Department shall notify all applicants and currently enrolled students of their admission assignments in writing by mail not later than 21 days after the application's return deadline has expired.

The most crucial feature of this three-step procedure is the reservation to the School Department of the power to assign the applicant to a specific school and program in a school. As the Timetable of Performance, *infra*, makes plain, the analysis of applications and the assignment of pupils to schools and programs will be supervised by the court.

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Examination Schools

Citywide schools range from the three examination schools with special entrance requirements, to the Title I eligible subsystem schools, to schools which have achieved distinction in offering unique programs at all levels. Some of the schools are now being erected, for use in 1976.

Boston Latin School and Boston Latin Academy will continue for the school year 1975-76 to provide a six-grade program and to accept both 7th and 9th grade students. At least 35% of each of the entering classes at Boston Latin School, Boston Latin Academy and Boston Technical High in September 1975 shall be composed of black and Hispanic students. The School Department may utilize the scores of applicants on the SSAT, alone or combined with students' grade point averages or standings as criteria for admission. The School Department shall exercise its judgment in setting criteria such as a minimum SSAT score or relative weights to be given to scores and grades, so long as the criteria chosen result in entering 7th and 9th grade classes at least 35% black and Hispanic. These orders apply only to the 1975-76 school year and are subject to change both as to grade structure and admissions criteria, dependent upon an ongoing evaluation of racial data and of the effect of this admissions program upon the desegregation of the examination schools.

The School Department shall also institute and conduct programs (a) to make all students in the system aware of the admission requirements and type of instruction offered at the examination schools, and (b) to recruit black and Hispanic applicants to the examination schools in future years.

Any tutorial programs given to prepare students for entrance examinations shall be conducted on a desegregated basis, as shall advanced work classes (if they are to be continued). Any enrichment and remedial programs

for students admitted to or enrolled in the examination schools shall be available and conducted on a desegregated basis. There shall be no tracking of students within the examination schools which results in racially segregated classes.

Institutional Support

Institutions of higher education and culture, business corporations, labor unions and other organizations in the Greater Boston area have committed themselves to support, assist, and participate in the development of educational excellence within and among the public schools of Boston. These institutions shall not be asked or required to make grants of their funds, or to be responsible for administration. There is no wish or intention on the part of the court or of these institutions to usurp or replace the proper role of the School Department or any of its employees; their sole purpose is to benefit the public school children of the city.

The court has matched colleges and universities with particular high schools, both community and citywide, and with selected other schools and programs, in ways that fit the capabilities and needs of the partners. Other colleges and universities may be added as this Plan is implemented. In addition, businesses have been explicitly paired and associated with schools. The leadership of the Boston Trilateral Task Force, composed of business and other concerned institutions, has pledged itself to continue and enlarge this kind of support in order to supplement academic theory with business practicality.

Labor organizations have expressed a readiness to support and assist in occupational, vocational, technical, and trade education, and planning for some programs has already begun. The court will foster paired relationships in similar detail at a later stage in the planning. A committee of the Boston Bar Association has assisted the

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court in developing institutional support and will continue to do so.

The Metropolitan Cultural Alliance, a membership organization of 110 cultural institutions, has also renewed its commitment to continue its support and assistance to schools in the Citywide District as well as in several Community School Districts.[4] The Alliance made a major contribution to the implementation of the state plan in 1974-75 by working with thousands of students and hundreds of teachers. This work will continue to expand and improve. Its major impact will be upon Citywide magnet programs.

The pairings listed below shall enable participating institutions of higher learning to share in the direction and development of curriculum and instruction under court-sanctioned contracts with the School Department. These contracts shall be unique to each institution and its matching school. They shall set forth the scope of authority of the parties and the role to be played by each in educational program planning, curriculum development, instruction, research, and the like. The city defendants shall use their best efforts to negotiate a contract pertaining to each school listed below acceptable to both the Boston School Committee and the contracting institution of higher learning. Good faith discussions and negotiations are already in progress between college and university representatives and School Department personnel, in cooperation with an Ad Hoc Committee of three attorneys appointed by the court on April 15, 1975. Jurisdiction is reserved to enter additional orders in this area should they become necessary.

Several of the colleges and universities are currently conducting programs, some of long standing, in various schools. The pairings listed below do not supplant programs

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[4] Details appear in Appendix D.

either already in operation or planned independently of this plan. Also, some undertakings may overlap, e.g., a college may work in a high school located in a district where a different college has general responsibility. In order to promote understanding of the roles of paired educational and business institutions, the Orientation and Application booklet shall include language substantially as follows:

> "To assist the school department in its efforts to improve the quality of education in the Boston school system, many colleges, universities and businesses in the greater Boston area are collaborating with individual schools, most but not all at the high school level, in designing and implementing new programs of instruction and strengthening existing programs. Cooperation from the business community began last year in the form of a Tri-Lateral Task Force whereby particular companies were paired with particular schools. Other businesses have since volunteered to enter into "pairings" with schools, and labor organizations have also shown interest in helping.
>
> "Along similar lines, beginning in April of this year colleges and universities have been paired with the schools listed below and collaborative efforts have begun toward making various planning and educational resources of area colleges and universities available to the particular schools listed, in the hope of formulating and implementing magnet type educational programs of the general description indicated. The process of planning and developing new educational programs is a complex and continuing one. It is impossible to predict what programs now in the planning stage will have been developed completely by the fall of this year. However, a great deal of effort is currently being expended in the hope that

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new programs may be ready for enrollment in the fall of this year or later during the 1975-76 school year. Furthermore, magnet-type programs which were in existence during the 1974-75 school year, which are also listed below, will continue and in some instances will have been expanded by the time schools open next fall."

There follows a list of the college and university pairings:

Participating Colleges and Universities

1. *Boston College* will work with Community School District 3, West Roxbury, at all school levels from kindergarten through Roslindale High. It will help plan programs for the new Southwest 1 Citywide high school, somewhat along the lines developed to date.[5]

2. *Boston State College* will work with Community School District 5, Dorchester, at all levels, including the two high schools, and with Boston High School, a Citywide magnet school.

3. *Boston University* will work with the Brighton-Mission Hill Community School District 1. In addition, it will support and assist the Bilingual Hispanic programs located throughout the city.

4. *Brandeis University* will work with the Citywide magnet English High School, which will be both a comprehensive four year high school and a specialty school for the arts.

5. *Bunker Hill Community College* will work with the Charlestown school components of the Madison Park Community School District 8, giving special emphasis to the development of a retailing education program and other

[5] See George G. Collins, Educational Associates Inc., *An Overview of the Educational Specifications for a Proposed High School in West Roxbury.*

cooperative programs between Charlestown High and the College.

6. *Emerson College* will work with the Citywide magnet Copley Square High School.

7. *Emmanuel College* will work with the Citywide magnet William H. Ohrenberger School.

8. *Harvard University* will work with the staff and students of Roxbury High School.

9. *Lesley College* will work with the Citywide magnet Hennigan Elementary School.

10. *The Massachusetts College of Pharmacy* will work with the Citywide magnet Mackey Middle School.

11. *Massachusetts Institute of Technology* will work with the cooperation of Wentworth Institute, to redesign East Boston High School into the Citywide East Boston Technical High School and with the Barnes Middle School, a new Citywide magnet middle school. Both schools will stress aspects of environmental protection engineering and aviation maintenance technology.

12. *Northeastern University* will work with the Madison Park Community School District 7 at all levels.

13. *Regis College* will work with the Citywide magnet Boston Latin Academy, formerly known as the Girls Latin School.

14. *Simmons College* will work with Jamaica Plain High School.

15. *Stonehill College* will work with Hyde Park High School.

16. *Suffolk University* will work to support and assist the schools included within the Title I Model Subsystem. It will also assist Citywide Boston Trade School.

17. *Tufts University* will work with the Citywide magnet Boston Technical High School.

18. *University of Massachusetts,* Boston, will work with Community School District 6, South Boston, at all levels

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from South Boston High to elementary schools. This support, includes help in developing the McCormack Middle School. University of Massachusetts will also collaborate with *Boston State College* in Dorchester.

19. *Wellesley College* will work with Citywide magnet Boston Latin School.

20. *Wheelock College* will work with the Citywide magnet James Curley School.

The Tri-Lateral Task Force, made up of business leaders, has been working with the Boston School System since June of 1974 to improve the quality of education. This represents a substantial commitment of the talent, resources and experience of the Boston business community to the city's high schools. The pairing of businesses with high schools, similar to the pairing of institutions of higher learning, will establish a degree of responsibility and identification resulting in a genuine commitment to heightening the effectiveness of each school.

Participating Business Organizations

The list of businesses which have agreed to assume a responsibility for a specific school and the tentative pairing with high schools is as follows:

1. Blue Cross Blue Shield—Occupational Resource Center
2. Boston Edison Company—Boston Technical High School
3. Boston Gas Company—Jamaica Plain High School
4. Federal Reserve Bank—Boston Latin School
5. First National Bank of Boston—Hyde Park High School
6. Gillette Company Safety Razor Division—South Boston High School
7. Honeywell, Inc.—Brighton High School
8. International Business Machines—Boston Latin Academy

9. John Hancock Insurance Company—English High School
10. Ledgemont Laboratories—Boston Technical High
11. Liberty Mutual Insurance Company—Charlestown High School
12. Massport Authority—East Boston High School
13. National Shawmut Bank—Copley High School
14. New England Merchants Bank—Roslindale High School
15. N. E. Mutual Life Insurance Company—Jeremiah Burke High School
16. New England Telephone Company—Dorchester High School
17. Prudential Insurance Company—Boston High School
18. State Street Bank—Roxbury High School
19. The Stop and Shop Companies, Inc.—Charlestown High School
20. Traveler's Insurance Company—Jamaica Plain High School

Citywide Schools and Programs

All Citywide schools except the English Language Center and the examination schools, shall reserve 25 percent of their seats for students residing in the Community District in which the school is located. There follows a listing of the schools that comprise the Citywide School District, together with the court's designation of the program of instruction to be featured in each. Program features were developed on the basis of descriptions provided by the School Department combined with modifications introduced by the court for the purpose of enhancing the desegregative power of the schools as magnets:

High Schools

1. *Boston High School.* Limit on capacity: 600. This school features work/study, or cooperative education. Its students must be employable, so that the close relationships established with businesses and other employers may

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be sustained. The academic program of the school will constitute a comprehensive high school program commensurate with state requirements. The work program entails paid employment and coordinated supervision. Hispanic bilingual instruction shall be provided.

2. *Boston Business School.* Limit on capacity: 500. This is a 13th year school for business education stressing skills preparatory for employment in business, office, secretarial and related fields. This school shall be subject to the same desegregation guidelines and listing in the Orientation and Appication Booklet as all other citywide schools.

3. *Boston Latin Academy.* Limit on capacity: 1200. This coeducational school features a 7th through 12th grade college preparatory, classical program of instruction.

4. *Boston Latin School.* Limit on capacity: 2100. This coeducational school features a 7th through 12th grade college preparatory, classical program of instruction.

5. *Boston Technical High School.* Limit on capacity: 1750. This is a scientifically and mathematically oriented technical school which prepares students for careers in science, mathematics, engineering, and industrial technology.

6. *Boston Trade High School.* Limit on capacity: 800. This school shall function as a general high school emphasizing academic as well as trade and vocational education by close association with the Occupational Resource Center. Where once this school had students in residence and was smaller in capacity, its basic plant is sound and shall be improved for full non-residential utilization by September, 1975.

7. *Copley Square High School.* Limit on capacity: 500. This school features alternative ways of motivating students to learn. Its program is comprehensive. It includes

a solid academic, college preparatory base mixed with a flexible "Extern" program which enables students to work and study in diverse settings throughout the city on an approved project basis. This school is part of the Title I Model Subsystem of Boston.

8. *Projected East Boston Technical High School.* Limit on capacity: 1350. This school, now East Boston High School, will be redesigned academically to become the city's second technical, science and engineering-oriented secondary school as of September, 1976. It will stress instruction in environmental protection and aviation-linked technology.

9. *English High School.* Limit on capacity: 2200. This school features a comprehensive academic program combined with elective specialties in the performing and visual arts. Self-expression through creativity and sensitivity is one of its goals. A program for 180 Hispanic bilingual students is included.

10. *Projected Madison Park High School.* Limit on capacity: 3000. The programs of this school will be planned during 1975-76, and the new facility will be open for use in September, 1976.

11. *Temporary Madison Park High School.* Limit on capacity: 1500. This 9th through 12th grade school will offer a diversity of alternative education programs in combination with a solid base of academic offerings, somewhat in the manner of Copley Square High School. This school will operate at 100 Arlington Street for only one year, 1975-76, after which its students will be guaranteed seats, upon application, at the new Madison Park High School.

12. *Projected Southwest I High School.* Limit on capacity: 1200. The program features of this school will be planned during 1975-76, and the new facility will be open for use in September, 1976.

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Middle Schools

13. *Projected New Barnes Middle School.* Limit on capacity: 1100. The program features of this school will be planned during 1975-76, and the new facility will be open for use in September, 1976. The program will be coordinate with the new programs to be planned for projected East Boston Technical High School.

14. *Martin Luther King Middle School.* Limit on capacity: 1000. The programs of this school feature a strong emphasis on instruction in the language arts and mathematics, including computer applications. The school shall also contain a Hispanic bilingual program for 100 students and shall function as a resource school for leadership in special education.

15. *Horace Mann Middle School.* Limit on capacity: 250. This school shall comprise the relocated Hennigan Middle School, which serves as the Title I Model Subsystem Middle School for Boston. Its program emphasizes highly individualized instruction, multicultural content, and an open, flexible approach to scheduling. The facility shall be improved and made fit for use as a magnet middle school by September, 1975.

16. *Charles E. Mackey Middle School.* Limit on capacity: 550. This school features a strong program in all basic subjects, with special opportunities for work experience and for participation in art and music. Skills in the humanities and in applied sciences will be emphasized.

Elementary Schools

17. *James M. Curley Elementary School.* Limit on capacity: 350. This school features an experimental, ungraded program divided into kindergarten, primary, and intermediate units. Skill mastery in basic subjects is combined with an emphasis on a closeknit, family style relationship between faculty and students.

18. *Guild Elementary School.* Limit on capacity: 390. This school features a strong program in language arts within the framework of a basic and traditional method of grouping and instruction.

19. *Haley Elementary School.* Limit on capacity: 300. This school features a partially ungraded approach to highly individualized and small group instruction, but it is traditional rather than experimental in method and content.

20. *Donald McKay Elementary School.* Limit on capacity: 700. This school features reading and mathematics laboratories as well as special concern with instruction in general and applied science and the uses of the scientific method. The curriculum style is traditional.

21. *Rafael Hernandez Elementary School.* Limit on capacity: 200. This school features a distinctive experiment in bilingual and multicultural education. It welcomes students who wish to learn Spanish as well as English and want to learn about Spanish culture. Up to 130 Hispanic students may enroll.

22. *Hennigan Elementary School.* Limit on capacity: 1000. This is an open space, multicultural school that features a library, a swimming pool, a fine gymnasium, and division into five large learning areas. Children are grouped by age and ability for instruction in basic skills and subjects. The program includes Portuguese bilingual instruction for 20 students.

23. *Jackson-Mann Elementary School.* Limit on capacity: 1000. This new facility houses a multicultural educational program, including clusters for Hispanic bilingual instruction for 100 students, adjacent to a technically advanced unit for the special education of children with speech and hearing problems.

24. *William H. Ohrenberger.* Limit on capacity: 750. This is an open education school situated on a twelve

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acre wooded location. Each teaching area is called a pod and is made up of from four to six learning areas which are near a large, common learning area. The program emphasizes the need for each child to proceed at a pace consistent with his own ability and learning style.

25. *William Monroe Trotter Elementary School.* Limit on capacity: 600. This school is the Title I Model Subsystem Elementary School and features multi-graded classrooms in which each child learns at his own pace and in his own style. Using open classrooms and study pods, Trotter's faculty encourages students to explore and select activities freely within a flexible framework established by each teacher.

Special Schools

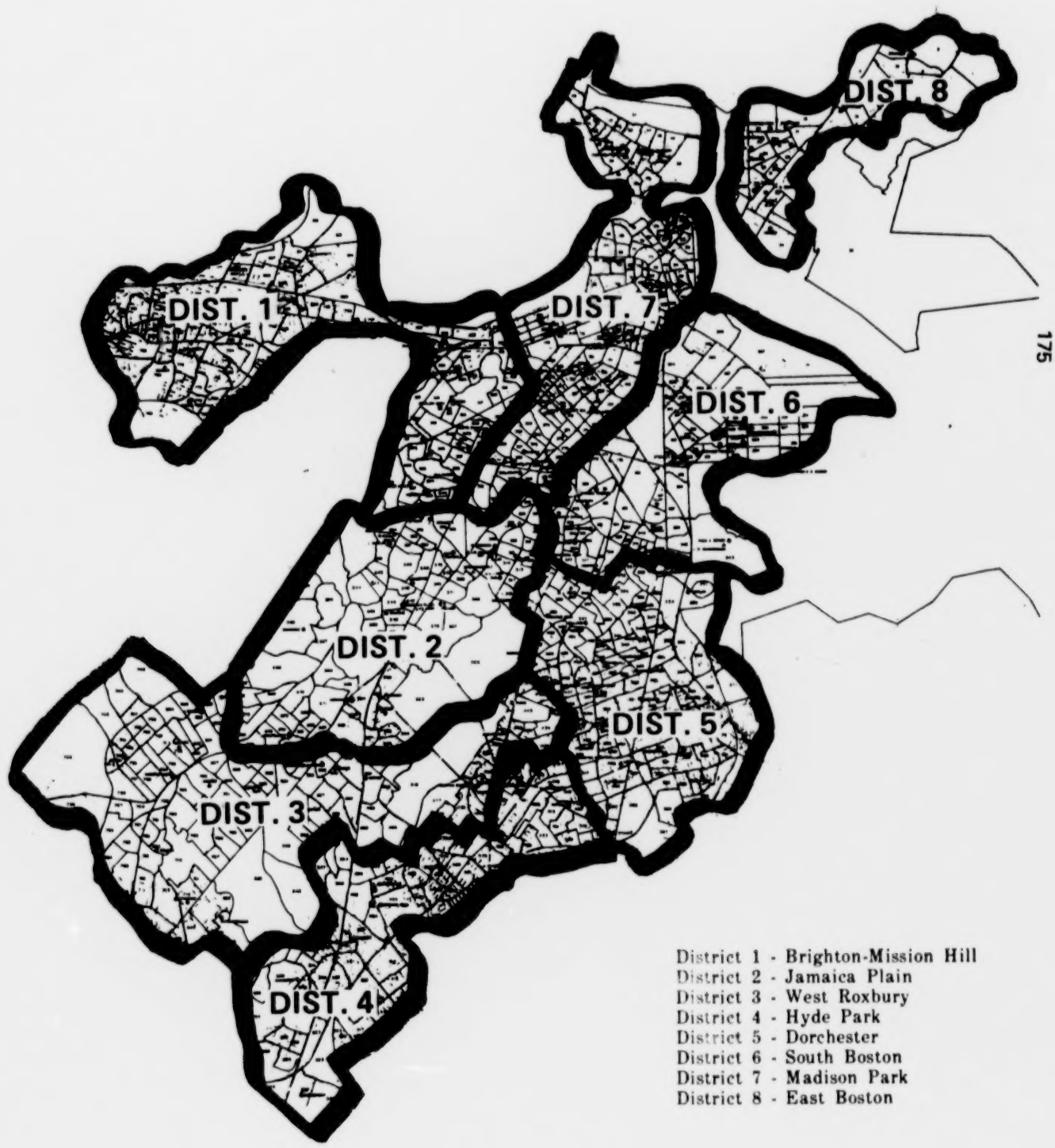
26. *The English Language Center.* Limit on capacity: 350. This center specializes in the teaching of English as a second language to students — many of them new to the United States — whose home language is not English.

Maps and Tables

The following map of the city shows the eight Community School Districts and shows the locations of the schools in Citywide School District 9. A table listing those schools which will be citywide in 1975-76 with their capacities and bilingual clusters indicated, and seat totals at each grade level, accompanies the map. A second table gives the citywide racial and ethnic composition of enrolled students in 1974-75.

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District 1 - Brighton-Mission Hill
District 2 - Jamaica Plain
District 3 - West Roxbury
District 4 - Hyde Park
District 5 - Dorchester
District 6 - South Boston
District 7 - Madison Park
District 8 - East Boston

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Table 9.

CITYWIDE SCHOOL DISTRICT 9.

School	Limit on Capacity	No. Bilingual Students
1. Boston High School	600	Hispanic 60
2. Boston Business School	500	
3. Boston Latin Academy	1200	
4. Boston Latin School	2100	
5. Boston Technical High School	1750	
6. Boston Trade High School	800	
7. Copley Sq. High School	500	
8. English High School	2200	Hispanic 180
9. Temp. Madison Park High School	1500	
10. Martin Luther King Middle	1000	Hispanic 100
11. Mackey Middle	550	
12. Horace Mann Middle	250	
13. James M. Curley	350	
14. Guild	390	
15. Haley	300	
16. Donald McKay	700	
17. Rafael Hernandez	200	
18. Hennigan	1000	Portuguese 20
19. Jackson-Mann	1000	Hispanic 100
20. Ohrenberger	750	
21. Trotter	600	
22. English Language Center	350	

High School Total	11150
Middle School Total	1800
Elementary School Total	5640
TOTALS	18590

CITYWIDE 1974-75 STUDENT ENROLLMENT[1]

	— NO. STUDENTS —					PERCENTAGE		
Grade Level	White	Black	Other Minority	Total		W	B	OM
K1 + K2	6678	3274	1271	11223	—	60	29	11
1 – 5	16077	13184	4512	33773	—	48	39	13
6 – 8	8448	6719	1939	17106	—	49	39	12
9 – 12	12210	7322	1838	21370	—	57	34	9
13	880	237	324	1441	—	61	16	23
K – 13 Total	44293	30736	9884	84913	—	52	36	12

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

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C. Vocational Education

Ongoing programs in occupational and vocational education in the high schools shall serve desegregated student bodies within the districts on the same bases as all other programs in the system. However, in order to avoid hardship to students and, in some instances, their families, students currently enrolled in vocational programs who would be in 11th, 12th or 13th grade in September 1975, may elect to continue in place and complete their diplomas. Tenth grade students and any new 11th and 12th grade students entering vocational programs in Community District schools shall be residents of the district and they shall be defined in all respects as part of the general student body of each school. An exception shall be the 10th grade of the cooperative-industrial program in machine shop instruction offered at East Boston High School, which shall be open to students residing in other districts and shall receive applications for enrollment under the same guidelines and restrictions governing other citywide programs.

Where occupational and vocational programs are ongoing in 1975-76, they shall be properly equipped, housed, and staffed for effective instruction. Representatives of the court will inspect these facilities and review their staffing and operating plans not later than August 1, 1975.

The city and state defendants shall fulfill their responsibilities under state law to make occupational and vocational education the equal in quality of programs now extant elsewhere throughout the state. In order to accomplish this goal, the city and state defendants shall prepare a single, unified plan which shall be filed with the court not later than September 8, 1975. The plan shall include: (a) detailed program and facility plans for an Occupational Resource Center designed for citywide use; (b) provision of access to desegregated occupational and

vocational education for every high school student in the system; (c) provision for bilingual and special needs instruction in selected portions of the overall program; (d) plans to phase out outdated programs and to introduce new, updated programs appropriate to changes in the state's occupational mix.

D. Guidelines For Assigning Students

Assignments shall be made by a staff unit designated by the Superintendent, under the supervision of court representatives.

Applications

The parents of each prospective student, or the student if 18 or older, will be asked to indicate preferences among school assignments. At the elementary and middle school levels, parents should rank up to three preferences from among the citywide schools and a community district assignment. Assignment to a community district school is guaranteed at the elementary and middle school levels, for any student who prefers such an assignment or who indicates no preference. At the high school level, the parents or students should rank three preferences among the citywide high schools and a community district assignment. The admission process will attempt to honor these indicated preferences.

Assignments to Community District Schools

The basic unit for assignment shall be the geocode, i.e., except where specifically provided, all students shall be assigned to community district schools on the basis of the geocodes in which they reside. Geocodes may be divided into as many as three parts, but only where such a division aids in achieving the assignment goals. Each community district school shall have assigned to it geocodes that lie within the district, so that each school's racial and ethnic composition generally reflects the percentages of white, black and other minority students,

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kindergarten through grade 13, who reside in the district. Assignments of geocodes to schools should avoid, wherever feasible, dividing neighborhoods that are ethnically integrated, and should attempt to minimize the transportation of students.

Where necessary in order to fit students assigned by geocode units to seat capacities, to make allowance for geographical obstacles and transportation routes and to minimize mandatory busing, the composition of schools within a district may vary within ranges to be determined by computing the white, black and other minority shares of the District's student population and multiplying the resultant percentages by 25 percent. For example, white students residing in Brighton-Mission Hill District 1 make up 44 percent of the Distret's school population. Under this guideline the extent of permissible variation is determined by multiplying 44 by 25%; the extent of permissible variation thus is 11 percentage points. While the desired norm shall be 44 percent, the percent white students in District 1 community schools may, where necessary, range between 33 and 55 percent. The tolerances provided here, based on the size of each group, assure protection against disproportionate isolation for the smaller grups within each district, while providing the latitude to minimize mandatory busing and ease the matching of geocode to school capacities, consistent with desegregation.

Exceptions to these variation limits shall be permitted where necessary to allow appropriate bilingual assignments or to allow students in any racial or ethnic group to be assigned to a particular school in groups of at least twenty. As a result, some schools may have no other-minority students in attendance.

Certain students will be assigned without the use of geocodes. Students in need of bilingual education or

special education will be assigned individually to appropriate programs within the district of residence. High school students entering their year of graduation in the fall of 1975 and students wishing to continue participation in a vocational program will, if they request, be assigned to the school attended in the previous year, even if that school lies outside the applicant's district of residence.[6]

Admissions and Assignments to Citywide Schools

Admission and assignment of students to citywide schools shall be on an individual basis, not by geocode. They shall grant student preferences to the extent possible while at the same time achieving a racially desegregated student body, providing seats for high school students from districts with overcrowded community district high schools and assuring that the compositions of community district schools remain within the ranges set for those schools. Admissions and assignments shall be made under the supervision of representatives of the court, and will be reviewed by the court.

Admissions and assignments shall be carried out so as to achieve racial and ethnic compositions at citywide schools closely reflecting the racial and ethnic composition of the school system as a whole. The white and combined black and other minority percentages at each citywide school shall be within five percentage points of the systemwide percentages (projected as 51% and 49% respectively for 1975-76), thus allowing a range of ten percentage points (56% to 46% white and 54% to 44% combined black and other minority for 1975-76). Other minority students may make up as much as but no more than 30% of admissions, and no minimum percentage will be required, but where possible black and other minority students will be admitted to each citywide school in proportion to the systemwide black and other minority per-

[6] For the assignment of kindergarten students, see *ante*, p. 4.

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centages (37% black and 12% other minority for 1975-76).

These admission guidelines for citywide schools are subject to three exceptions: (a) Students entering their year of graduation in the fall of 1975 shall be assigned to the school attended in the previous year, if they elect that school as their first preference. (b) The Hernandez school, which contains a citywide Spanish-English bilingual program, may enroll a student body up to 65% Hispanic. Non-Hispanic other minority students will be eligible along with white and black students, within the remaining 35% of school capacity. (c) The examination schools are subject to independent desegregation requirements for the 1975-76 school year.

Citywide assignments shall be made in a manner that avoids carrying any community district school's composition beyond the variation limits for white and black students set in the section governing community district school assignments.

If a citywide school is oversubscribed, applicants shall be admitted in the following order of priority: applicants residing in the community district where the citywide school is located, up to 25% of the school's capacity; applicants who attended the school in the preceding year; high school students whose community district school is, or during the assignment process, remains oversubscribed; all other applicants.

Applicants shall be selected, from among students in the same category of priority, on the basis of the preference rankings entered on their enrollment applications for the particular citywide school (e.g., a first preference for a particular school will outrank a second preference for the same school); further admission selections shall be made at random, except to the extent necessary to prevent overcrowding at the community district schools or departure in community district schools from the variation limits for

white and black students set in the section governing community district school assignments.

If high school students do not elect to attend citywide high schools in numbers sufficient to prevent overcrowding at community district high schools, high school students shall be assigned to citywide high schools to the extent necessary to prevent overcrowding at community district high schools, using the following method: from each racial or ethnic group of applicants for admission to an oversubscribed community district high school, students shall be selected at random for admission to the community district high school until the school is filled to the capacity set in this plan in accordance with the racial and ethnic percentages and permissible variation limits for that community district. Students not admitted to the community district high school to which they applied shall be assigned to citywide high schools, honoring preferences entered on enrollment applications where possible and in all other cases placing the student at the citywide high school opening nearest to his residence in keeping with the guidelines applicable to citywide schools generally.

A master list of all prospective enrollees shall provide the basic resource for implementing the assignment procedure. The list shall be developed by the School Department alphabetical list of students filed April 10, 1975 by the school committee, as revised by the addition of and supplemented by geocode designations and the reconciliation of data on the list with data obtained from the enrollment application forms.

Transfers

A student may transfer from one school to another with a suitable opening only when the transfer, whether intradistrict or interdistrict, would diminish racial imbalance, i.e., move the racial composition of the more racially imbalanced of the two schools closer to the systemwide racial

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composition. Transfers may also be made to provide students with appropriate bilingual or special education services and for purposes and under conditions authorized by the court in orders entered in these proceedings during the fall of 1974.

E. Transportation

Students are assigned to schools on the basis of community districts on the one hand and citywide magnet schools on the other. Within any Community District, the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles. Bus travel times will average between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes. Students bused at one school level such as 1 through 5, will be assigned to walk-in schools at the next level such as 6-8, wherever possible.

The court finds that an adequate remedy in this case must involve mandatory transportation of students. 20 U.S.C. § 1755. Mandatory transportation by chartered bus refers to the service that the School Department shall provide for students assigned to elementary schools which are more than 1 mile from home; for middle school students who live more than 1½ miles; and for students assigned to high schools who live more than 2 miles from the school. The reason for mandatory transportation may be distance, safety, or controlled transfer, or a combination of these. For high school students assigned to schools within ready reach of mass transit, the School Department may fulfill its obligation by providing for free use of buses and subways. Mandatory bus transportation will be required for approximately 21,000 students, as follows:

Grades	*Students*	*Bused*
	Total	*To Be*
1 – 5	33,773	12,000
6 – 8	17,106	5,000
9 – 12	21,370	4,000
	72,249	21,000

Because of the use of district boundaries, between one-third and one-half of students bused mandatorily will travel shorter distances than students totaling approximately 17,000 who are bused mandatorily under the state plan currently in effect.

Assignment of every student to the school closest or next closest to his residence, considering only school capacity, natural physical barriers or both, along with grade level and the type of education provided, cannot achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic distribution in the city. 20 U.S.C. § 1713 (a) (b), § 1714. Revision of attendance zones and grade structures, construction of new schools and the closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formulation of the plan here adopted in order to minmize mandatory transportation. 20 U.S.C. § 1713. The court finds, however, that some transportation of students to schools other than those next closest to their residences is required to remedy adequately the denial of plaintiffs' dual school system in Boston. 20 U.S.C. § 1702(b), § 1714(a). The court has required no transportation, however, that would pose a risk to the health of students or impinge on the educational process for those students due to excessive time or distance travelled. 20 U.S.C. § 1714(b).

The School Department shall prepare a transportation plan and file it on or before July 7, 1975 for review by and approval of the court. After notice the court will hear the parties on the question whether a consultant in modern transportation engineering should be appointed to assist and supervise preparation of a transportation plan providing the safest, shortest and cheapest routes and stops for every District.

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F. Cost Considerations

The plan will require the use of approximately 420 buses, if planned transportation routes develop like those used in 1974-75. On these assumptions the busing costs, computed at $100 per bus per day, would total approximately $7.6 million per year. More precise route and stop planning might reduce this by $1 million per year. Virtually all of the costs of mandated transportation under this plan are fundable by the State Board of Education. Such costs will amount to less than 7 percent of the school committee's annual budget, and in this respect are well within the national average school district outlays for transportation.

The plan allows completion of those projected and on-going school facility construction projects which are noted in the section on school closings and in the sections containing planning specifications. Proposals for other facility replacements shall be filed by the Public Facilities Department or the School Committee for court review, and will be approved where they are necessary for health and safety reasons or for desegregation.

The plan orders that 13 schools which are open this year and 11 now unused be closed permanently. Savings in fuel and maintenance expenditures will be realized from these closings. Efficient utilization of space will be possible in an estimated 70 elementary schools which are now fully heated and maintained, but under-enrolled.

The plan has as a goal voluntary desegregation through the Citywide District schools and the application process for registering program preferences. Roughly one-fourth of all students may be located in schools by parental option. This may enable safety and enforcement expenditures to be reduced from those incurred during 1974-75.

The plan requires expenditures for a Citywide Education Council, Community Advisory Councils, District office staff and equipment, and for increased numbers of school admin-

istrators. Staffing can be achieved from within the existing complement of personnel, and through normal methods of replacing resigning and retiring personnel. Staff development costs for the plan will include outlays for minority recruitment and hiring previously ordered, and staff training in human relations and for new assignments in changing programs.

By obtaining institutional support through school pairings, savings in support and assistance costs may be realized and new external revenues generated. These institutions may serve as fiscal agents for research, teacher training, curriculum, and program development grants and contracts.

By obtaining institutional support through school pairings, savings in support and assistance costs may be realized and new external revenues generated. These institutions may serve as fiscal agents for research, teacher training, curriculum, and program development grants and contracts.

The treatment in the plan of special needs students conforms with state law and enables the Boston public schools to qualify for federal and state aid for special education.

With the implementation of the plan, the Boston public school system may attract more funding from public sources and from increased numbers of private sources.

G. Citizen Participation, Monitoring and Reporting

Citywide Coordinating Council

Membership

A Citywide Coordinating Council (CCC) will be established having approximately 40 members appointed by the court. The membership will include members of the white, black, Hispanic and Asian ethnic groups, parents from all sections of the city and persons from educational, business, labor, civic, religious and community organizations. Two members of the Citywide Parents' Advisory Council

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(CPAC) will be members of the CCC, as will two students to be selected from Racial-Ethnic Student Councils. Most, but not all, CCC members will be residents of Boston; all will be persons deeply concerned with the welfare of the city and its school system. Diversity of views regarding school desegregation will be sought consistent with willingness to support the responsibilities of the council. Members of the CCC will be appointed to serve through June of 1976. The court will appoint an interim CCC chairperson and subcommittee chairpersons for a period of 60 days, during which time the CCC shall hold elections for these positions.

Purposes

The CCC will foster public awareness of and involvement in the process of implementation of the court's desegregation orders. It will be the primary body monitoring implementation on behalf of the court. It will in this connection file monthly reports with the parties and the court covering its activities. It will attempt to avoid the difficulties caused by lack of preparation and community education associated with the state plan currently in effect. It will work to develop the cooperative efforts of universities and labor organizations with the Boston schools. The CCC will attempt to identify and resolve problems by mediation and conciliation. In its actions, it will act with awareness of the needs of non-English speaking groups and communities in the city. It may bring unresolved problems to the attention of the parties, the court or other appropriate persons. It may communicate and publicize its views and recommendations to the public, the parties and the court. The CCC will not co-manage or make policy for the Boston schools. Neither will it assume the responsibility of the Boston school committee and superintendent and other defendants to carry out the court's orders.

Organization

Separate subcommittees of the CCC will deal with each of the following areas:

(1) *Public information*—the provision of accurate and adequate information concerning all aspects of the desegregation plan and process.

(2) *Monitoring*—assuring compliance by all parties with the court's desegregation orders and monitoring of other aspects of the desegregation process[7] through the administration and extension of the present monitoring program established by the Community Relations Service.

(3) *Community Liaison*—exchange of information and assistance between the CCC and business, civic, neighborhood, religious and academic groups and agencies; coordination of efforts and stimulation of new efforts from these groups when and where needed.

(4) *District Council Liaison*—development of a plan for formation and operation of Community District Advisory Councils; liaison with local councils when established.

(5) *Education Programs*—support of efforts to improve quality education; addressing problems in the desegregated provision and accessibility of various programs, including bilingual, special needs, magnet school and vocational programs; liaison with universities, colleges, cultural, business and labor groups involved in mutual assistance arrangements with the school committee and department.

(6) *Public Safety and Transportation*—monitoring of the development and implementation of safety and security procedures and of human relations programs and other training in connection with desegregation.

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[7] Such aspects, which may not be covered by specific court order, may include school committee policies, administration and staffing, curriculum and instruction, discipline, transfer procedures, police-school relations, budgeting and allocation of resources and teacher and student human relations training.

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(7) *An executive committee* composed of the CCC chairperson, the subcommittee chairperson and one member of the Citywide Parents' Advisory Council will conduct CCC business between meetings of the full council, receive subcommittee reports and recommendations and authorize and approve subcommittee activities. It will formulate bylaws and establish quorums and other procedural rules for the CCC and the subcommittees. The bylaws may provide for cochairpersons or vicechairpersons of the CCC and its subcommittees and for their immediate election, in which event they shall assume office immediately and share responsibility with the interim chairpersons appointed by the court to serve for 60 days. A member of the Community Relations Service of the Department of Justice shall be permitted to attend and participate in meetings of the executive committee in a non-voting capacity.

The Boston school commitee and superintendent shall meet with the executive committee of the CCC at least once each month in open session to discuss progress in implementation of the plan and resolution of problems identified by the CCC. The school committee shall provide the CCC with copies of agendas and minutes of all school committee meetings.

Meetings

The CCC will meet at least once each month and the subcommittees at least twice each month. The agenda for CCC meetings shall be prepared and publicized in advance. The CCC will act in open session and any written reports to the court will be public. The Community Relations Service of the Department of Justice will provide technical assistance to the CCC and a member of the Service shall be permitted to attend and participate in meetings of the CCC and its subcommittees in a non-voting capacity.

Powers and Authority

The CCC will be the monitoring body for the court. The CCC shall have the power to discharge its responsibilities adequately, including the authority to hold public meetings, conduct hearings, make written reports and make inspections of school facilities. The parties shall cooperate fully with the CCC and provide its members with reasonable access to information required for its work. The CCC may submit recommendations and reports to the court and shall file monthly reports with the court beginning July 1, 1975.

The CCC shall have staff assistance including a staff director and necessary secretarial and clerical personnel, all of whom it will select, appoint and fix compensation for, subject to court approval. It will have permanent office space not associated with any party or the court. Salaries and other expenses of the CCC, including expenses of the monitoring program which have been approved by the court, shall be paid by the city defendants.

Community District Advisory Councils

A community district advisory council will be established in each district, including citywide school district 9, no later than one month after the opening of school in the fall of 1975. (The citywide district's advisory council is included in all references to community district advisory councils.) Each district council shall include 10 parent representatives who shall be elected at a meeting of the Racial-Ethnic Parents' Councils of all the schools in that district from among their members; two student members will be elected by the Racial-Ethnic Student council members of the district's schools from their membership.[8] A district council may contain no more than 20 members including represen-

[8] Schools where in the fall of 1975 the criteria for establishment of Racial-Ethnic Parent and Student Councils are not met may elect representatives to vote with Racial-Ethnic Council members in selecting district council members.

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tatives of teachers, police, school department administration, business, university, labor or community groups. The CCC will nominate such representatives as reflect the composition of the school population and needs of the district for appointment by the court to complete each district council. Each district council will develop as soon as possible, preferably within two weeks of its establishment, bylaws concerning quorums and meeting procedures. District council members shall elect a chairperson from its membership to preside at council meetings, which shall be held at least once each month. Meetings may be held in the office established for each district by the school department. There shall be a secretary located in that office who will work for the council. Vacancies in elected membership will be filled by elected alternates; vacancies in appointed positions will be filled by the court from nominations of the district council endorsed by the CCC. The district councils will act as an advisory group to district school department personnel and will monitor implementation of the plan on the district level. Reports of CCC monitoring will be sent to the appropriate district council. Unresolved matters may be brought by district councils to the CCC, which will supply assistance and supervision to the district councils. Reasonable access to information shall be given to district councils by the parties.

Racial-Ethnic Parent Councils

The establishment and operation of Racial-Ethnic Parent Councils (RPCs) in each school, as set out in the court's order of October 4, 1974 and amendments thereto, shall continue. Additional schools which in 1975 meet the criteria for establishment of RPCs shall elect RPCs. The RPCs will continue to provide mechanisms for concerned parents to address racial problems in their children's schools. Their role will be expanded to include electing parent represen-

tatives and alternates to the community district advisory councils.

The Citywide Parents' Advisory Council (CPAC) similarly will continue to provide support and communication to the local RPCs. It will be increased in size according to the number of districts established by the court's plan, so as to continue to be composed of two members from each district, and will also contain two Hispanic and two Asian-American parent representatives to be elected by citywide caucuses of parents and guardians of Hispanic and Asian-American students. The CPAC will elect two of its members to the CCC, one of whom will serve on its executive committee, and the CPAC will work especially closely with the community liaison subcommittee of the CCC. The CPAC will remain the body exclusively composed of parents concerned with resolution of racial problems within the schools.

Reports

Appropriate school personnel shall participate with Community District Advisory Councils and with school Racial-Ethnic Parents Councils in developing during the course of the school year an annual report of the progress covering that school. The Superintendent shall file with the court on or before February 1, 1976 a report stating the procedures instituted, responsibilities delegated and forms devised for the purpose of compiling information to be contained in the annual reports. These individual school reports shall be analyzed and consolidated by the District Superintendent in each community school district and in the citywide school district, with the assistance and participation of the Community District Advisory Council. The Superintendent shall file with the court annually on or before July 15 a report covering the entire system for the previous school year. Copies shall also be sent to the

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CCC and shall be available to the parties and to interested citizens.

The report shall contain racial and ethnic data and other information on each school, each district, and systemwide covering:

1. The number and percentage of students in each racial or ethnic category by grade in each school, and by grade level in each district and systemwide.
2. The number and percentage of faculty in each racial or ethnic category by grade (or subject taught) in each school, and by grade level in each district and systemwide.
3. The number and percentage, in each racial or ethnic category, of other staff within each job classification, including transitional aides, bus monitors, attendance supervisors and custodial staff, at each school, in each district, and in the system as a whole.
4. The length of experience of faculty and numbers of faculty with permanent or provisional status at each school, and by grade level in each district and in the system as a whole.
5. The number and percentage, in each racial or ethnic category, of administrators within each job classification, at each school, in each district, and in the system as a whole.
6. The number of students suspended and the length of their suspensions, and the number expelled, in each racial or ethnic category, by month of suspension or expulsion.
7. In each racial or ethnic category, by number of days absent (reasonably classified), the number of absentee students, and the percentage of all students in that racial or ethnic category that this number constitutes,

at each school, and by grade level for each district and systemwide.

8. Student achievement information, e.g., results of reading tests, showing the number and percentage of students within each racial or ethnic category for each school and, by grade level, for each district and systemwide.
9. The number and percentage, in each racial or ethnic category, of student transfers requested and of transfers granted, by ground for transfer, e.g., desegregative, medical necessity, etc.
10. The number and percentage of students, in each racial or ethnic category, enrolled in special programs including bilingual education, vocational programs, special education (showing the number and percentage taught in separate classrooms and the number and percentage otherwise taught), advanced work classes and others, at each school and, by grade level, in each district and systemwide.
11. The adequacy of facilities, the conversion or repairs made on facilities.
12. Plans for new schools or additions or expansions of existing facilities with projected enrollment data by race or ethnicity and a statement of how such plans will affect desegregation.
13. Plans for improvements in school facilities, staff, supplies and programs.
14. Staff training and human relations training provided to staff and students, with details as to numbers of participants, nature and length of programs.
15. The number and percentage of students mandatorily transported to school, by grade and by race or ethnicity, the minimum and maximum distances travelled and minimum and maximum times of trip, the average distance and time travelled, for each school and dis-

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trict and systemwide totals for elementary, middle and high schools.

16. Citizen participation and involvement, including summaries of activities of Racial-Ethnic Councils, Community District Advisory Councils and Citywide Coordinating Council; use by community of school facilities.
17. Particular programs involving colleges and universities, business and labor groups and cultural institutions and types of programs conducted and numbers and percentages of students participating, by grade and race or ethnicity.
18. Budgets for areas of major expenditures during school year just ended and school year about to begin.

The report may also include other information which the Superintendent believes would be helpful or informative.

H. Timetable For Implementation

The defendants, their officers, agents, servants, employees and attorneys shall take all actions necessary to accomplish the steps set out below on or before the dates listed; where filings with the court are ordered, copies shall be served on the parties and the court-appointed experts.

May 19	File print-ready copy of the Orientation and Application Booklet for parents and students.
May 20	Hold seminars on the plan for principals, guidance counselors and others.
May 27	Mail approved booklet to parents and guardians and students, stating a deadline for returning applications of June 6, 1975.
May 30-31	Hold explanatory and orientation sessions for parents, students and teachers in every District.

June 6-19	Review applications and prepare student assignments.
June 20	Filed proposed assignments, enrollment totals and racial compositions of each school.
June 25	Mail approved notices of assignment to parents, guardians and students.
June 25-27	Plan student and parent orientation meetings to be conducted toward end of summer.
June 30	Complete faculty and staff assignments.
July 7	File transportation plan.
July 14	Notify parents, guardians and students of transportation provisions.
July 15	File report on job descriptions, hiring procedures and orientation and training plans for bus monitors, transitional aides and other staff; and report on development of contractual arrangements with colleges and universities.
July 30	File safety and police utilization plans which shall be drafted as soon as possible in consultation with other governmental agencies; report on facilities preparations; and report on planning and arranging a two-week period of staff planning for operation of this desegregation plan which shall be the ten week days immediately prior to the opening of the schools in the fall of 1975.

The city defendants may, on or before May 19, 1975 propose alternate dates for the steps listed above and propose additional steps they believe to be essential, with suggested deadlines.

The school department shall develop and file, on or before May 23, 1975, a detailed plan of activities, responsibilities, and internal scheduling for the implementation of the plan

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ordered by the court in the available time period, similar to that filed as section VII of the plan filed by the school committee on January 27, 1975.

I. Further Remedial Orders

The Boston School Committee, the Superintendent, the Public Facilities Department, the Mayor, the State Board of Education, all their members, officers, commissioners, agents, servants, employees and attorneys, and all other parties and persons in active concert or participation with them who receive actual notice of these orders by personal service or otherwise, are hereby Ordered to implement the student desegregation plan hereby established and to comply with all its provisions in accordance with the timetable for implementation stated in the previous section.

The orders contained in the student desegregation plan herein established and in this section shall be binding upon the Boston School Committee, the Superintendent, the Public Facilities Department, the Mayor, the State Board of Education, all their members, officers, commissioners, agents, servants, employees and attorneys, and all other parties and persons in active concert or participation with them who receive actual notice of these orders by personal service or otherwise.

The interlocutory order entered in these proceedings on June 21, 1974 included in Appendix A to the court's opinion on that date is hereby made final.

All previous orders of the court included in these proceedings which are not inconsistent with specific provisions of the student desegregation plan hereby established shall remain in full force and effect unless modified by the court upon application of a party.

J. Retention of Jurisdiction

The following areas, as to which the parties have made separate filings, shall be among the subjects for further hearings and orders in these proceedings and are among

the matters not finally disposed of by the student desegregation plan and various remedial orders: desegregation in promotion and hiring of administrators; desegregation of other school department personnel, e.g., attendance supervisors; student discipline; assignment of faculty; advanced work classes; and establishment of a Citywide Student Racial-Ethnic Council.

The court retains jurisdiction generally.

(s) W. Arthur Garrity, Jr.
United States District Judge

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Appendix A

Answers of John J. Kerrigan filed December 27, 1974 to Questions Propounded by the Court Order dated December 23, 1974

Q 1. What affirmative steps, if any, will you take to promote the peaceful implementation of the state court plan currently in effect?

A. I will continue to obey lawful orders of the Court, but I will take no initiative or affirmative action to advocate or supplement this plan which in conscience and principle I oppose based on my belief that the plan increases racial hatred in Boston, endangers the safety of school children in Boston and leads to white flight from Boston to the suburbs, where one can live free of forced bussing.

Q 2. Will you vote to take the steps necessary to implement a citywide desegregation plan, as outlined in the eleven timetables included in section VII of the plan submitted December 16, 1974, such as approval of contracts for transportation of students and for changes in and repairs of facilities?

A. If and when a citywide desegregation plan is enacted by the Court, I will obey lawful orders issued by the Court with respect to the plan but I will take no initiative or affirmative action to advocate or supplement such a plan unless it reduces racial hatred in Boston, provides adequate safety for the school children in Boston and reduces the white flight from Boston to the suburbs.

Q 3. Will you obey and carry out future orders of the court concerning implementation of a citywide student and faculty desegregation plan, such orders as are now being formulated or may in the future be approved by the court?

A. I will obey and carry out lawful orders of the Court as may in the future be formulated but I will take no initiative or affirmative action to advocate or supplement any such plan unless in my belief it reduces racial hatred in Boston, provides adequate safety for the school children in Boston and reduces white flight from Boston to the suburbs.

Q 4. To what extent, if at all, has your commitment made in the letter of November 11, 1974 from Secretary Winter of the School Committtee to the Department of Health, Education and Welfare that

> "The Boston public schools presently are, and will continue to be, in full compliance with these orders of the Federal Court for the desegregation of the Boston public schools. The Boston public schools will comply with all future modifications of the order."

been changed or abandoned?

A. The letter of November 11, 1974 recites my intention to obey all lawful orders of the Court. I have not changed that intention, but I will take no initiative or affirmative action to advocate or supplement a plan which in conscience and principle I oppose based on my belief that the plan increases racial hatred in Boston, endangers the safety of school children in Boston and leads to white flight from Boston to the suburbs where one can live free from forced bussing.

Q 5. In view of the decision and opinion of the Court of Appeals dated December 19, have you changed your position regarding approval of the December 16 desegregation plan and, if so, in what way?

A. No.

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Appendix B

Partial Judgment and Interlocutory Order

This action came on for trial before the court, and the issues having been duly tried and a decision having been duly rendered, as set forth in an opinion filed herewith, that the rights of the plaintiff class of black students and parents under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants in their management and operation of the public schools of the City of Boston,

Partial Judgment

It is Ordered and Adjudged that the defendants John J. Kerrigan, chairman, Paul Ellison, John J. McDonough, Kathleen Sullivan and Paul R. Tierney, who are the members of the Boston School Committee, and William J. Leary, Superintendent of Schools of the City of Boston, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who receive actual notice of this judgment and order, be permanently enjoined from discriminating upon the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston school system; and said defendants are further Ordered to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants.

Interlocutory Order

It is further Ordered that, pending further order or unless specific leave of this court is obtained, said defendants be preliminarily enjoined from:

(a) failing to comply in any respect with the Racial Imbalance Act plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974;

(b) beginning the construction of any new school or expansion or the placement of any new portable;

(c) granting transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments;

(d) granting transfers under exceptions to the controlled transfer policy.

June 21, 1974

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APPENDIX C

SUFFOLK UNIVERSITY

OFFICE OF THE PRESIDENT
Beacon Hill
Boston, Mass. 02114
(617) 723-4700

March 19, 1975

Honorable Jacob J. Spiegel
Presiding Officer of the Panel of Masters
Room 1412, John W. McCormack Building
Post Office Square
Boston, Massachusetts

Dear Judge Spiegel:

We at Suffolk University join with the other institutions of higher education of the Boston area who have indicated their desire to be helpful in extending vigorous cooperation to assist the Boston Public Schools to improve the quality of the Public School System.

We request immediate opportunities to explore with the Masters and their advisors guidelines for developing constructive efforts and contractual relationships that engage the professional competences of our institutions within the current limits of our present capacities.

As a first step to the earnest effort that each of us wants to make, we need more information and knowledge about ways and means to make effective contributions to improving the quality of the Boston School System. We are eager to indicate at the outset that our institutions do not desire

to enter into the governing structure of the Boston School System. We are also aware of the wide variations in the capacities of our institutions and expect that these variations will be reflected in the contracts that may be drawn.

Sincerely yours,

(s) THOMAS A. FULHAM
THOMAS A. FULHAM
President

TAF:mcs

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Appendix D

Examples of Magnet Integration Programs by Metropolitan Cultural Alliance

PROGRAM	CULTURAL INSTITUTION	SCHOOLS	STUDENTS	LENGTH
American Crafts	Museum of Fine Arts	Michelangelo F. V. Thompson	65 6th-graders	6 days
SUMMARY: Students visit a recreated early American community in New England, then learn early American crafts, including portrait painting, quilt making, silver making, etc. Gallery tours and craft sessions at the museum directly linked to American History classes.				
American Experience	Museum of Fine Arts Concert Dance Co. Museum of Transportation Pocket Mime Theatre Stage One Theatre Workshop Boston	English High Burlington High Randolph High Waltham High Watertown High	40 10-12th graders 10 " " " 10 " " " 10 " " " 10 " " "	6 days
SUMMARY: Working together in groups of 20, students investigate the lives of everyday Bostonians, 1890-1914, using the resources of two museums and the skills of members of four performing companies. Topics for detailed study include transportation, aesthetics, foods and eating, music, family life, work.				
Dr. Opera	Associate Artists Opera Co.	Charles E. Mackey Middle	60 8th-graders	6 afternoons
SUMMARY: Following attendance at an open rehearsal of Associate Artists Opera Company and an in-school performance by members of that company, students meet and work with singers, directors and set designers.				
Mini Workshops	Children's Museum	Agassiz School Central Elementary School, Stoneham	34 5th-graders 30 " "	12 afternoons
SUMMARY: Using the resources of The Children's Museum, students work in one of four in-depth workshops: Living Things, Japanese Children Today, Bookmaking, or One Hundred Years Ago or So.				

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PROGRAM	CULTURAL INSTITUTION	SCHOOLS	STUDENTS	LENGTH
The Moving Game	Museum of Transportation	Martin Luther King, Jr. Francis Wyman Middle Sch., Burlington	250 6th-graders 50 " "	5 days

SUMMARY: Together with staff from Museum of Transportation, students move around the city, to the harbor, airport, MBTA terminals. They learn to use maps, charts, and do time-space calculations.

Waterways	New England Aquarium Museum of Science Children's Museum	Mary E. Curley Middle Marshall Simonds Middle, Burlington	30 8th-graders 30 " "	12 afternoons

SUMMARY: Students study chemical properties, animal life, and ecology of three bodies of water, working closely with staff members of New England Aquarium, Museum of Science, and The Children's Museum.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LAURENCE S. FORDHAM, J. HAROLD FLANNERY, JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);

ROBERT PRESSMAN, ERIC E. VAN LOON
(CENTER FOR LAW & EDUCATION);

RUDOLPH F. PIERCE
(KEATING, PERRETTA & PIERCE);

NATHANIEL R. JONES (N.A.A.C.P.)

FOLEY, HOAG & ELIOT
10 Post Office Square, Boston, Mass. 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Tallulah Morgan, et al., black parents and their children enrolled in the Boston public schools, oppose the petition for certiorari of John J. McDonough, et al., the Boston School Committee and Superintendent of schools.

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Argument

The District Court in this case faced the task of desegregating a school system enrolling 80,000 students in about 200 schools (A. 177; 379 F. Supp. at 459[1]). The Petitioner had intentionally engaged in many unconstitutional practices — including student segregation, teacher segregation, and discriminatory resource allocation — which affected "all of the city's students, teachers and school facilities". 379 F. Supp. at 482. The Petitioners also evaded and obstructed enforcement of a state desegregative statute. 379 F. Supp. at 418-20, 440-41, 452-55, 477, 479-80. The Petitioners made plain that they would do nothing to promote orderly desegregation not expressly ordered by the Court (A. 47, 66, 200-01) and resisted every attempt to enlist help from others (A. 42-46, 48-51, 52-54). After repeatedly defaulting in their duty to approve a desegregation plan (A. 63-67, 72-73), they finally submitted a freedom of choice plan which they knew would not work (A. 10-13, 46-47). Meanwhile, some white adults and students resisted desegregation by means including violence (A. 63-65).

The District Court expressly disclaimed any power to impose educational policies on the Boston public schools (A. 74). It shaped a plan under which schools varied from 30% white to 95% white and 21,000 students were bused (as compared to 17,000 under the previous State Plan and more than 30,000 using transportation before desegregation began). (See description in part 1, below.) The court's plan did go beyond mere transportation: it used magnet schools to promote voluntary desegregation

---

[1] This method of citation will be used here for the District Court's decision finding constitutional violations, *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1 Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

(A. 84-85), provided for the equalization of facilities and programs (A. 82-83), and called for the involvement of parents, local colleges and experts to help make the plan work peaceably and effectively (A. 106-12). These measures were reasonable means to proper ends, and hence within the District Court's discretion. The basic — and erroneous — premise of this Petition's attack on them is that a desegregation court's power is limited to ordering busing, and that attempts to deal with other racial discrimination in the schools and to forestall violence and obstruction are forbidden even on a record such as this one.

This case differs from other desegregation litigation only in the unusual resistance the District Court's orders have encountered from the Petitioner and others, and in the unusually careful analysis of the District Court (A. 69-115) and Court of Appeals (A. 2-54). Indeed, Chief Judge Coffin's discussion (A. 38-42, 46-65) of the claims pressed here by the Petitioners is itself the best answer to the Petition. There is no occasion for this Court to depart here from its practice of not reviewing the details of desegregation plans.

1. The Lower Courts Disclaimed Any Power to Seek Educational Improvement for Its Own Sake.

At the very outset of its analysis of the principles governing remedies for segregation, the District Court stated (A. 74):

> "The plan which the court adopts as a remedy in this case does not rest on any supposed constitutional right of a student to attend a school that has a particular ethnic composition, or whose ethnic composition matches that of the school system as a whole . . . . Nor does the plan reflect any imagined independent

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> constitutional power of the court to decide what educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities."

The court's plan (A. 116-99) keeps well within the principles laid down in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). It divides Boston into eight contiguous community school districts, and a ninth non-geographic district containing magnet schools (A. 118-77). The districts range from 40% white to 95% while in projected student population (A. 151, 157), and individual schools could vary from 30% white to 95% white (A. 180). Compare, e.g., *Swann*, 402 U.S. at 9, 22-25; *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 474, 489-90 (1972). (If East Boston is excluded (see A. 90-91), this last range shrinks to 30-70% white (A. 37-38).) The pre-existing grade structure (K-5, 6-8, 9-12) is preserved (A. 103, 121). About 21,000 students are to be bused, for periods averaging 10-15 minutes each way and in every case less than 25 minutes (A. 184). This compares to the busing of 17,000 under the previous plan, originally imposed under state law (A. 62-63, 185; *School Committee of Boston* v. *Bd. of Educ.*, 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916), and to the more than 30,000 students using public transportation or school buses under the segregated system (A. 92).

The District Court's few references to educational quality were for limited and proper purposes, as appears when they are put in context (parts 2 and 3 below). For example, experience in this system (379 F. Supp. at 429-32) as elsewhere teaches that magnet schools must have educationally attractive programs if they are to effect voluntary desegregation. Similarly, desegregation courts

are properly concerned with the equalization of facilities and services in previously black and white schools, and with the avoidance of educationally disastrous or impossible remedies. E.g., *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 465-67 (1972); *Swann, supra*, 402 U.S. at 18-19, 30-31; *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 300-01 (1955).[2] As the Court of Appeals said of the advisory role of committees (A. 51):

> "Attention to educational programs from the perspectives of banning active discrimination, assuring equal educational opportunity, meeting the effects of past discrimination, and alleviating the transition to desegregation is obviously a proper goal needing no justification. While better quality education as a general goal is beyond the proper concern of a desegregation court, we do not view the court's instructions to be divorced from its efforts to devise an effective plan of desegregation."

Both the District Court and the Court of Appeals, in short, properly understood their role.

2. Measures Challenged by the Petition Directly Promoted Desegregation of Student Assignments.

Although the Petition (pp. 10, 19) asserts that requiring "thirty-five percent of the 1975-1976 entering class to the examination schools be black or Hispanic (A. 162) is likewise an educational decision", it was ordered by the District Court solely to desegregate schools previously

[2] The Petitioners themselves relied heavily on educational techniques (A. 9-13) and attacked plaintiffs' plan in the District Court as "a student reshuffling plan which has no educational programs". Record Appendix on Appeal, School Committee volume, p. 58.

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overwhelmingly white (A. 100; 379 F. Supp. at 466-68). The reasons for this approach — including the absence of desegregative alternatives, and the reliance of Petitioners on an unvalidated entrance examination with racially exclusive effects — were painstakingly set forth (A. 38-42, 99-104). The lower courts renounced any intention to impair the vitality of these schools (A. 41-42) and rejected a proposal to alter them on grounds unrelated to discrimination (A. 103 n. 17).

The use of magnet schools to promote voluntary desegregation (A. 84, 158-77) was plainly desegregative, vigorously urged by the Petitioners (A. 10-12), and supported by authority. E.g., *Hart* v. *Community School Bd.*, 512 F.2d 37, 54 (2nd Cir. 1975); 20 U.S.C. § 1713(f); Mass. G.L. c. 71, §§ 37I-37J. The Petition's assertion (p. 16) that the District Court improperly selected the programs to be used to make some schools magnetic, since "there had been no default by the petitioners in this area", is baseless. First, the Petitioners *had* defaulted in the magnet school area, both by failing to carry through on promises to desegregate new schools under state law with magnet techniques (379 F. Supp. at 429-32), and by submitting a wholly unrealistic magnet plan to the District Court (A. 12 & n. 10). Second, failure in every particular area is beside the point. In light of the Petitioners' numerous defaults in other areas (e.g., A. 13, 46-47, 53, 63-67, 72-73, 93) and their avowal that they would take no desegregative measures not specifically ordered (A. 66, 200-01), the lower courts were not required to swallow their proposals without examination. See *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 207-10 (1973). The courts, of course, had a duty to see that less effective remedies were not adopted when better ones were available. *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). Third, the District Court *did* adopt the Petitioners' proposals

at all but five or six of the 26 magnet schools (A. 47 n. 43, 169-74), resorting to modifications only "for the purpose of enhancing the desegregative power of the schools as magnets" (A. 169). Fourth, the Petitioners did not object in the District Court to the court's power to specify programs, or to the specific programs required (A. 48).

The involvement of local colleges and universities at the magnet schools (A. 48-49, 84, 166-68) likewise served a desegregative function by making those schools more magnetic, and was appropriate in view of past School Committee defaults. The District Court only ordered the Petitioners to negotiate in good faith with the colleges, without imposing specific terms (A. 109-10, 164), and made clear that there was no intention to usurp the proper role of the School Department (A. 163, 204-05). Involving colleges helped insure that the District Court itself would not have to deal with matters beyond its expertise should the magnet programs not succeed (A. 49-50). And much of the funding used by the colleges comes from the state defendants, who support the District Court's order (A. 49).

The retention of experts to help monitor implementation (A. 53-54, 179, 181) was also directly related to desegregation. Courts routinely appoint experts to help draft desegregation plans. E.g., *Swann*, 402 U.S. at 8-11; *Hart* v. *Community School Bd.*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2nd Cir. 1975). Here, the District Court's plan left to school officials the assignment of students to specific schools within the community school districts (A. 95 n. 11, 179-83). The time was short (A. 196-97), and failure or evasion could have led to segregative assignments or total confusion. It was only sensible to keep on hand the experts familiar with the plan. The Petition's implication (pp. 10, 20) that the experts were

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to make educational policy decisions is unfounded. The one case in which the experts were empowered to make *any* decisions was during an emergency in the assignment process caused by the Petitioners' violation of court orders (A. 53) — and even then immediate court review was provided (A. 53-54). That matter is now moot (A. 54), and the experts have merely a monitoring and advisory role.

3. Measures Challenged by the Petition Secured Enforcement of the District Court's Plan and the Removal of Lingering Discrimination.

A desegregation court's power is not limited to the announcement of a student assignment plan. It can also take measures to ensure that the plan will actually be followed. See, e.g., *Griffin* v. *County School Bd.*, 377 U.S. 218, 232-34 (1964); *United States* v. *Barnett*, 376 U.S. 681 (1964). And it can remove racial discrimination within the school system. E.g., *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 571 (1974) (extracurricular activities); Swann, 402 U.S. at 18-20 (extracurricular activities, building maintenance, equipment distribution, teacher segregation); *Rogers* v. *Paul*, 382 U.S. 198 (1965) (access to courses); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) (segregation within school); see *Wright* v. *County of the City of Emporia*, 407 U.S. 451, 465 (1972) (facilities). Congress has also recognized that desegregation usually involves more than transferring students, by funding remedial services, teacher training, supportive services, and the like. 20 U.S.C. § 1606(a). Nothing could be more short-sighted than to argue that a court's power to wipe out the dual school system "root and branch" extends only to busing plans and the like, and does not include the power to remove ancillary discrimination and to promote effective and orderly compliance.

The exercise of this power was particularly appropriate here, and did not even approach an abuse of discretion or a case requiring this Court's attention. The Petitioners' systematic obstruction of desegregative duties imposed by both state and federal law foreboded enforcement problems (A. 13, 46-47, 63-67, 72-73; 379 F. Supp. at 418-20, 440-41, 452-55, 477, 479-80).[3] The Petitioners expressly denied any affirmative duty to do anything not specifically ordered by the court, in plain defiance of *Swann*, 402 U.S. at 15. (A. 46-47, 66, 200-01). The violence that accompanied interim desegregation measures (A. 63-65; *United States* v. *Griffin*, 525 F.2d 710 (1st Cir. 1975)) clearly showed the need for measures promoting peaceable desegregation. Discrimination in the Boston public schools, moreover, was not limited to segregation: black students were subjected to inexperienced teachers, were excluded from the "elite" examination schools, and were channelled into the more outmoded branch of a dual vocational training system. (A. 29; 379 F. Supp. at 461-63, 466-69).

These concerns warranted involvement of colleges and universities, to the extent such involvement went beyond the assistance to magnet programs already discussed. See 45 C.F.R. § 181.4(c)(9) (subsidies for university involvement). First, that involvement gave promise to the court and community that expert assistance would be at hand during any difficulties of desegregation, and that neutral outsiders would notice any evasion or obstruction (A. 75-76, 82-83). These tasks could not be entrusted to the Petitioners, who refused to do anything but follow specific orders. Second, the colleges were to help in the "equalization of services at schools that have been unequal" (A. 82; see 108) and in the avoidance of discrimi-

[3] See U.S. Comm'n on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility (1975).

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natory or racially stereotyped instruction (A. 83), plainly proper goals (A. 83) (citing cases).

The requirement that each school have a principal or headmaster (A. 119) was proper for similar reasons: it ensured that there would be someone in charge to navigate the shoals of desegregation, and to guide in the equalization of programs (A. 51-52, 75, 83). In the past, elementary school districts containing several schools but only one principal had been manipulated to segregate students within the district (A. 52). The court's decision to avoid multi-school districts in its plan necessarily required new administrative arrangements. Cf. *Swann*, 402 U.S. at 27-28. The Court of Appeals made clear that the plan should not be construed to require equal salaries for principals of small and large schools (A. 52).

The plan's provision for multiracial committees including parents, students and other citizens (A. 187-93) is a traditional part of desegregation plans (A. 50, 112), in this instance shaped with the help of the Community Relations Service of the Justice Department (A. 111). The Petition's suggestion (pp. 10, 18) that these committees were given any power to implement their views is incorrect (A. 50-51, 188). Their function is to monitor compliance and report problems (A. 50-51, 83, 111-12, 188, 192). Since disruption had already occurred in 1974 (A. 63-65), and discriminatory hiring had resulted in an overwhelmingly white school staff (379 F. Supp. at 463-66), the appointment of multiracial committees promoted a peaceful transition to a system in which people of all races participate on equal terms (A. 51, 112; *Brown* v. *Board of Educ. of Bessemer*, 432 F.2d 21, 24 (5 Cir. 1971)).

This lengthy survey of the measures to which the Petition objects confirms the obvious: District Courts have a variety of remedies to choose from, and must be granted considerable discretion to mold the remedy to the local

circumstances. E.g., *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484, 4487 (1976). Remedies must be given a chance to prove themselves over time. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 722-23 (1974); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 235 (1969). None of the Petition's objections to the details of the District Court plan warrants review here.

4. THE COURT OF APPEALS DECISION HERE DOES NOT CONFLICT WITH *Keyes* v. *School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975).

The Petition errs in its claim (pp. 11-12) that the First Circuit's decision in this case is inconsistent with the rejection of the "Cardenas Plan" for bilingual education in *Keyes* v. *School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, — U.S. — (1976) (No. 75-701). The court there did not hold that segregation remedies "must be limited functionally to desegregation" (Petition, p. 12); on the contrary, it recognized that the District Court *could* require the schools to help Hispanic children learn English to the extent that this was necessary to promote effective desegregation by enabling them to learn together with white children. 521 F.2d at 481-82. Thus, the Court remanded "for a determination of the relief, if any, necessary to ensure that Hispanic and other minority children will have the opportunity to acquire proficiency in the English language." 521 F.2d at 483. Such relief would far exceed anything in question in Boston.

What the *Keyes* court did object to was an elaborate bilingual plan extending to "matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, noninstructional service and community involvement", and including such matters as education for three-year olds and adults and clothing

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for poor children. 521 F.2d at 480-81. The court concluded that, in the absence of any finding that the defendants' treatment of Hispanic students constituted illegal segregative conduct or resulted from such conduct, the Cardenas plan went far beyond what was needed to ensure effective desegregation. 521 F.2d at 482. It could be supported only on the theories, which the court rejected, that the Constitution entitles minority students "to an educational experience tailored to their unique cultural and developmental needs", or that the Denver authorities had failed to comply with *Lau* v. *Nichols*, 414 U.S. 563 (1974). 521 F.2d at 482-83. No such theories are involved here.

This case is not like *Keyes*, but rather resembles the numerous desegregation cases in which this Court has found no occasion to review the District Court's exercise of discretion. The measures challenged by the Petition were limited, and in every instance were directly related to the proper goals of a desegregation court.

5. The Petition Attempts To Assert Claims Not Raised on the Record in This Case.

The Petition's challenge to the District Court's power to designate the programs of magnet schools (pp. 10, 16) was never raised in the District Court (A. 48). The Petition's objection (pp. 10, 18) to the appointment of committees by the District Court was also not presented to that court; the Petitioners' only objection there was to any vesting of substantive powers in the committees (Record Appendix, Court of Appeals, School Committee volume, pp. 111, 173), and the District Court made clear that no such vesting was intended (A. 188). The Petition's present challenge to Dean Dentler (pp. 19-20) differs from those rejected below (A. 42-45), which the Petitioners have not sought to bring here. The Petition's disagreements (p. 13)

with subsequent orders of the District Court, appeals from which are now pending in the Court of Appeals, cannot be raised in this proceeding.[4]

6. No Issue Warranting This Court's Consideration Is Raised.

The issues raised by the Petition have no general import, but simply turn on whether particular remedial orders were adequately supported on this record. There is no question of a claim that courts are empowered to require good education as a goal in itself: both lower courts disavowed any such power (A. 51, 74). Nor can it be argued that desegregation courts are empowered only to put students of different races into the same school building by compulsory means: under some circumstances, promoting voluntary desegregation through magnet schools, preventing discrimination within desegregated schools, and securing orderly and effective compliance with court orders is plainly proper. Whether the District Court's orders went too far is an issue which can be decided only in view of the circumstances of this case, and an answer will give little help to other courts in other circumstances. Cf. *Swann*, 402 U.S. at 31.

The broad discretion granted District Courts in this area likewise counsels against review. E.g., *Swann*, 402 U.S. at 12-13, 15-16, 28; *Gilmore* v. *City of Montgomery*, 417

[4] The District Court found it necessary to give further relief because of continuing discrimination and segregation at South Boston High School, which had the effect of driving black students from that school. Restoration of the school's facilities was adopted as part of a limited receivership in order to draw those students back and to provide constructive common activities which might alleviate destructive disputes. Transcript, 12/9/75, pp. 68-115; Order Concerning South Boston High School, 12/9/75; Supplementary Findings and conclusions on Plaintiffs' Motion Concerning South Boston High School, 12/16/75.

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U.S. 556, 571 (1974). All reasonable methods are available to formulate an effective remedy. *Hills* v. *Gatreaux*, 44 U.S.L.W. 4480, 4484 (1976). Especially where the relatively peripheral matters raised by the Petition are concerned, "The framing of decrees should take place in the District rather than in Appellate Courts." *Int'l Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). When equities are balanced in such a complex case, it is always possible to pick words out of context and argue that, by themselves, they reflect erroneous standards. "Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided." *Swann*, 402 U.S. at 24 n. 7. In this case, however, the District Court arrived at an extraordinarily consistent and moderate plan, based on sensitive consideration of all relevant factors and in full compliance with this Court's decisions. The Court of Appeals, after its own detailed analysis, found the desegregation plan well within the District Court's power.[5]

To uphold the Petition's claims, moreover, would drastically impair desegregation in Boston and elsewhere. The conclusion would be drawn that a desegregation court's power is limited to ordering busing. Some of the parts of the District Court's plan which have proven most attractive to parents and students would be destroyed. And the outside help—parents, colleges, and experts—which is helping make the plan work would be removed from the scene, just as the Petitioners attempted below to remove the masters and experts (A. 45-48; 401 F. Supp. 270). For other obstructive tactics, see 379 F. Supp. at 418-20,

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[5] There has been no shortage of appellate review in this case. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); 509 F.2d 599 (1st Cir. 1975); 509 F.2d 618 (1st Cir. 1975); 523 F.2d 917 (1st Cir. 1975); ___ F.2d ___ (1st Cir. 1976) (No. 75-1097). Five more appeals are pending below.

440-41, 452-55, 477, 479-80; A. 13, 46-47, 53, 63-67, 72-73, 93. Twenty-two years after *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954), the Petitioners' campaign to maintain intentional separation of the races in the Boston public schools should come to an end. What is needed now is not further appellate proceedings, but faithful implementation of the constitutional rights of the children of Boston.

Conclusion

Public and private misconduct, amounting at times to challenges to the rule of law itself, have marred school desegregation in Boston for almost two years. And the difficulties resulting from this resistance have been much publicized.

These Petitions, however, present questions that are unworthy even of note, much less certiorari. In a case that is unremarkable except for the law enforcement issues which the Petitions do not present, this Court is asked, in essence, to decide whether the district courts have discretion to fashion equitable remedies for constitutional violations; and secondly, to decide whether, after the painstaking exercise of that discretion and meticulous affirmance by the Court of Appeals, the relief granted is to be set aside because it has aroused community opposition and because it is inconvenient and expensive to the Petitioners who must provide it.

We treat the Petitions in Nos. 75-1441, 75-1445 and 75-1466 individually, of course, but brief consideration of them together illustrates the wisdom of this Court's often reiterated reliance upon the discretion of the lower courts with respect to the details of school desegregation remedies.[6]

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[6] Indeed, with the possible exception of *Milliken* v. *Bradley*, 418 U.S. 717 (1974), a school desegregation remedy case different from prior ones in kind rather than degree, this Court has not

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The Boston School Committee (No. 75-1445), whose rejected plans minimized desegregative pupil assignments in favor of educationally innovative magnets (A. 10-13), complains here that the District Court, as affirmed by the Court of Appeals, abused its discretion to the extreme of reversible error when it required educational components in order to enhance the realistic working of the plan and to equalize educational opportunities. After prolonged abdication of its responsibilities, this Petitioner argues that its prerogatives have been infringed and that the District Court, while empowered to require desegregation, may not order such related measures as are, in the careful exercise of the Court's discretion, reasonably necessary both to the effectiveness of the plan and to cure the effects of prior violations.

The Home and School Association (No. 75-1466) argues for the least possible degree of actual desegregation (contrary to this Court's opposite command in *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971), and *Hills* v. *Gautreaux*, — U.S. —, 44 U.S.L.W. 4480, 4484, (No. 74-1047, decided April 20, 1976) by an analysis reminiscent of the discredited "each school is an island" approach to the issue of the scope of the violation. This approach, properly characterized elsewhere as "inscrutable"[7] and disavowed by this Court in *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973), conveniently ignores a critical finding made by the District Court before this Petitioner became a party to this case, namely, that the defendants' segregative practices and their effects actually pervaded

once since its opinions in the *Brown* cases curtailed district court-ordered relief. Reversals of appellate curtailments of district courts' relief and enlargements of district courts' remedies are more familiar. See, for example, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Green* v. *County School Board*, 391 U.S. 430 (1968).

[7] *United States* v. *Texas Education Agency*, 467 F.2d 848, 874 (5 Cir. 1972).

the entire system. That finding necessitated comprehensive relief.

Intractable problems of practicability may limit desegregation, and have to some extent in this case, but it would be manifest error for a district court to strain to afford minimum relief for a maximum violation.

The Mayoral Petitioner (No. 75-1441) pays lip-service to comprehensive desegregation and acknowledges, as he must, the obligation of the District Court to require it. The Petitioner could not deny that the District Court carefully avoided—in design (A. 74, 78) and result (A. 19-20, 38) —reliance upon racial ratios, such as this Court cautioned against in *Swann*, 402 U.S. at 24. His arguments are based on the erroneous premise that the Masters Plan would have provided systemwide desegregation—a premise based on projections which the District Court found to be invalidated by later data (A. 87-89) and which the Court of Appeals called "clearly erroneous" (A. 14 n. 13). To this premise, the Petitioner adds the equally incorrect assertion that the District Court refused "to consider factors such as the extent of busing, the cost, community acceptance, and the potential for resegregation" (Petition, p. 2).

As we show in our Brief in opposition to the Petition in No. 75-1441, the Courts below gave plenary consideration to permissible limitations upon desegregation plans, and the Mayoral Petitioner's present assertions are unsupported by the record. The point here, however, is that these Petitions present a hodge-podge of overlapping and inconsistent arguments (desegregate if you must, but leave the education to us; minimize desegregation; improve education but disregard the lower courts' findings in order to resuscitate a less effective, assertedly more convenient, plan) illustrate as well as any words of ours can that this Court is well advised to leave the resolution of such remedial disputes to the lower courts.

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School desegregation plans that are manifestly impracticable, or that are arrived at by procedures that are fundamentally unfair to the litigants, perhaps should be reviewed. Rarely, however, has a school desegregation district court listened so often and so patiently to the numerous parties as this one has listened; rarely has a court of appeals so carefully reviewed so many challenges to a district court's handiwork. And although there has been some resistance and some continuing default by public officials, the plan ordered by the District Court, while it falls short of maximum practicable desegregation, realistically promises to work now.

Certiorari should be denied.

Respectfully submitted,

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MAY 18 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS

v.

TALLULAH MORGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

The respondents Board of Education and Commissioner of Education of Massachusetts (hereafter referred to collectively as the Board of Education) file this brief in opposition to the petition for certiorari of the Boston School Committee and Superintendent (hereafter referred to collectively as the Committee). The Board of Education is the state agency with

general superintendence over the Committee. Under state law, the Board is mandated to see that the Committee complies with federal constitutional guarantees as well as with state laws. Mass. Gen. Laws c. 15, § 1G. The Board believes that the orders of the district court are necessary to enforce the United States Constitution.

At the original trial on issues of liability, the district court found that the Board, a defendant, had not violated plaintiffs' constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). Nevertheless, the court retained the Board as a party in the case to participate in the framing of remedies. The remedial orders of the district court, formulated with the Board's assistance, are the subject of the Committee's petition.

Question Presented

Whether the United States Court of Appeals for the First Circuit erred in holding that the desegregation plan adopted by the district court was a proper exercise of its equitable powers.

Statement of the Case

The Committee asks this Court to review the judgment of the Court of Appeals for the First Circuit affirming an order of the District Court for the District of Massachusetts which established and ordered implemented a systemwide desegrega-

tion plan for the Boston public schools. The opinions and orders below are contained in the Appendix to the Petition.

On June 21, 1974, the district court held that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass. 1974). This finding was affirmed on appeal, *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), and this Court denied review, 421 U.S. 963 (1975). Prior to establishing a systemwide desegregation plan, the district court ordered the Committee, as interim relief for the academic year 1974-1975, to comply with a racial balance plan imposed under state law by the Massachusetts Supreme Judicial Court.[1] *Morgan* v. *Hennigan*, 379 F. Supp. at 483-84; A. 63. Because the state racial balance plan was inadequate as a systemwide desegregation plan (A. 63), the district court established guidelines for drafting a systemwide plan and ordered the Committee to file such a plan by December 16, 1974 (A. 65).

The Committee openly resisted the orders of the court to develop a desegregation plan.[2] On December 16, 1974, a majority of the Committee members refused to file a plan prepared by Boston School Department staff and did not file any other plan in its place (A. 66). At that point, counsel for the Committee filed the staff plan and sought leave to withdraw

[1] The Committee requested and was granted time from the court to develop alternatives to this state plan. The Committee subsequently refused to approve any of the alternatives developed by its staff (A. 72), and the state plan went into effect.

[2] The district court also found a history of noncompliance by the Committee with past racial balance orders of the Supreme Judicial Court and directives from the Board of Education. *Morgan* v. *Hennigan*, 379 F. Supp. at 418-420, 476-77; A. 62.

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from the case. The Committee members were thereafter held in civil contempt, and at the contempt hearings they each stated under oath that they would take no action on their own to bring about desegregation but would take only those steps directly ordered by the court (A. 66-67). One member stated that he would never vote for a plan that included "forced busing" of students although he knew it was impossible to accomplish desegregation without it (A. 67). On January 27, 1975, the Committee filed a plan that omitted mandatory busing and relied exclusively on freedom of choice and part-time resource centers, despite past experience in Boston establishing that these measures would not accomplish desegregation (A. 70-73).

On May 10, 1975, the district court issued its own system-wide desegregation plan. The plan represents a modification of a plan recommended by court-appointed masters, who had held hearings on plans submitted by the parties, and had incorporated many elements of these submissions in their plan. The court's plan divides the city into a number of geographical community school districts and a citywide system of magnet schools, as had the Committee's plan (A. 85-87). In a school system that is 51 percent white (A. 81), the community districts created by the court range from 40 percent white to 95 percent white (A. 127-57). Individual schools within community districts are permitted to vary $\pm$ 25 percent of the racial composition of the district (A. 180).[3] The magnet schools, which draw their students from the entire city, range from 56 to 46 percent white (A. 181). Students may choose either to attend a particular citywide magnet school or to stay in their own community school districts (A. 179). No student

[3] For instance, in a district that is 40 percent white, individual schools may range from 30 to 50 percent white, because 25 percent of 40 = 10 percent.

who chooses his community school district is transported outside of that district (A. 179). The plan mandates the busing of approximately 21,000 students, compared with 17,000 under the interim state racial balance plan, and 30,000 who were bused or used public transportation prior to desegregation (A. 92, 185). The average distance travelled is 2.5 miles; the longest is 5 miles (A. 184). Travel time averages between 10 and 15 minutes each way; the longest trip is less than 25 minutes (A. 184).

The plan has two other major components: community involvement and university pairings. Multi-racial parent/community organizations were created for each school and at the community district and citywide levels to assist the court in monitoring implementation of the desegregation plan. The plan prohibits these organizations from assuming any of the powers or responsibilities of the Committee (A. 188).

The plan also pairs a number of Boston public schools with local colleges and universities, businesses and labor organizations, or cultural institutions (A. 163-69). The purposes of the pairings include assisting with the development of the magnet programs, remedying the educational consequences of segregation, equalizing educational resources within the system, and monitoring the plan. The plan requires the Committee to use its best efforts to negotiate contracts with these outside agencies, whose participation is wholly voluntary (A. 164). The plan expressly disclaims any intent that these agencies usurp Committee responsibilities (A. 163). The costs of the planning and programs resulting from these pairings are almost entirely paid by the Board of Education, pursuant to Mass. Gen. Laws c. 71, §§ 37I and 37J (A. 49, 107).

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It is this desegregation plan that the Committee petitions this Court to review.

Reasons for Denying Writ

I. Introduction.

The Committee's petition should be denied because it does not present any of the considerations that customarily lead this Court to grant review. The petition does not raise any issue on which courts of appeals are in conflict or any important question of federal law that is unresolved by this Court. The decisions below are fully consonant with the applicable rulings of this Court and are plainly proper. The Committee, in essence, seeks one more chance to make arguments considered and rejected by the courts below. Further, the issues raised by the Committee do not have general application, but rather turn on the specific facts of this case, and therefore would provide no foreseeable guidance for the disposition of future cases. The process of desegregation required by the Constitution is now underway, and, despite official resistance, desegregated education is now the reality as well as the rule in Boston. The growing sense of finality about the existence of desegregated schools would be ill-served by further unnecessary review.

The Committee's main contention, that the district court has impermissibly intruded upon questions of educational quality unrelated to desegregation, rests on an oversimplified and mistaken characterization of the district court's desegregation plan and orders. It also ignores the fact that both the court of appeals and the district court carefully and specifically distinguished between those educational issues reserved to the

Committee and desegregation issues appropriate for the courts (A. 103-04, 50, 51, 74). As the district court stated, at A. 74:

> Nor does the plan reflect any imagined independent constitutional power of the court to decide that educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of this segregation. *Brown* v. *Board of Education*, 1955, 349 U.S. 294, 299 . . . *Swann*, *supra*, 402 U.S. at 16. Only the default of the school committee in this case has obliged the court to employ the help of the appointed experts and masters and to draw an adequate plan.

The Committee's arguments, upon analysis, reduce to the plainly untenable contention that a federal court's desegregation plan may redistribute students and do nothing else. The Committee's contention would prevent desegregation courts from taking steps to secure effective and stable desegregation, eradicate the educational consequences of segregation, and equalize the distribution of resources in the system.

II. The District Court Properly Exercised Its Equitable Powers In Accordance With This Court's Rulings.

In the first instance, the affirmative duty to devise and implement a desegregation plan falls on the school committee that has violated the Fourteenth Amendment. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16

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(1971). If a school committee defaults in meeting these obligations, the district court must formulate an effective desegregation plan. *Id.* This Court has thus recognized a difference between a school committee that affirmatively grasps its constitutional obligations and one, as the Committee here, that defaults, thereby causing the burden of accomplishing desegregation to fall on the district court.

In *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (U.S. April 20, 1976), this Court held:

> [I]n the event of a constitutional violation "all reasonable methods [should] be available to formulate an effective remedy," *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46, and . . . every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37.

The orders to which the Committee here objects are not excursions into educational policy making. Rather they are practical mechanisms, carefully devised to see to it that desegregation is effective in light of the failure of local officials to take the preferable course of devising and implementing a plan themselves. The actions, and inaction, of the local officials here emphasized the need for the district court to use its equitable powers broadly and flexibly to insure effective desegregation. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968). Although this Court has stated that remedies for segregation may be "administratively awkward, inconvenient, and even bizarre," *Swann*, 402 U.S. at 28, the desegregation plan at issue contains none of these features. Each of the

orders objected to by the Committee has at least one, and often several desegregative functions.

1. *University Pairings.*

The orders on university pairings and certain related program offerings are designed to make the heart of the court's plan — the magnet school system — function effectively. It is noteworthy that this voluntary desegregation device was originally proposed by the Committee (A. 70). There were, however, no assurances under the Committee plan that these schools would be desegregated — particularly in light of the historic ineffectiveness of such devices in Boston (A. 71) — or that the Committee, without assistance, could have had such schools ready for the 1975-1976 school year (A. 12). The involvement of area universities through the system of pairings increased the attractiveness of the magnet schools and increased the likelihood of their success.[4]

The court of appeals has made the most compelling response to the Committee's contention that school pairing impermissibly intrudes on issues of educational quality (A. 49):

> This argument — that the court has no legitimate function to improve quality — entirely misses the point that if magnet schools are to act as lodestones, drawing students voluntarily . . . quality is a key to this aspect of a plan of desegregation. And the court had been led in the clearest terms to understand that the Committee would do only what it was ordered to do. Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised,

[4] Successful magnet schools would, of course, minimize the amount of mandated transportation and be in accordance with Congressional policy. 20 U.S.C. § 1713.

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> but the supervision of compliance in this area, as opposed to student assignment for example, would have drawn the court into purely educational decisions. Paradoxically, therefore, the resort to outside contracting may have an effect precisely the opposite to that alleged by the appellants.

In some instances, the pairings were with nonmagnet schools. The use of outside institutions helped to insure in all paired schools that instruction was nondiscriminatory, educational services were equalized, and programs to remedy the educational deficiencies of segregation were installed (A. 83, 86, 108).

There is no detriment to the Committee from the pairings, nor was it unusual for the Committee to enter into contracts with universities for assistance (A. 164-65). Massachusetts law encourages the use of magnet schools to remedy racial imbalance, and explicitly contemplates the use of outside public or private facilities. Mass. Gen. Laws c. 71, §§ 37I, 37J. Under this law, the Board of Education is bearing most of the costs of planning and executing programs resulting from the pairings (A. 49, 107). Finally, the court limited itself to ordering the Committee to negotiate in good faith with the paired institutions toward the end of entering into mutually acceptable contracts (A. 164). It did not require the Committee to make contracts nor were any contract terms dictated by the court (A. 164-65).

2. *Program Offerings.*

The Committee's complaint that the court specified certain courses be given is also without merit. The Committee re-

peatedly defaulted on its obligation to produce a viable desegregation plan (A. 62-63, 70-73); had a history of using voluntary choice mechanisms to produce segregation (A. 12, 71); and refused to do anything to assist desegregation unless ordered (A. 46-47). The vast majority of the courses referred to in the plan (at A. 167-74) simply described the Committee's existing programs or courses. The Committee did not object below to the few instances where the district court deviated from the Committee's proposals, nor did it ever suggest any substitutions to the court (A. 47-48). The court's orders concerning courses were designed to enhance the attractiveness of the magnet schools (A. 48), and were plainly proper.

3. *Other Administrative Measures.*

Other orders objected to by the Committee were designed to assist with implementation and have precedent in other circuits. The order requiring the appointment of district superintendents for each district and a principal or headmaster for each school created no new categories of personnel, and insured that the desegregation plan would be implemented by having a person in charge at each appropriate level (A. 119). The court did not order the hiring of any new personnel, the replacement of any incumbents already in those positions, or the payment of any particular salary (A. 119, 83). The order was a practical step and was entirely consistent with precedent. *Swann*, 402 U.S. at 18-19; *Davis* v. *School District of the City of Pontiac, Inc.*, 487 F. 2d 890 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *Plaquemines Parish School Board* v. *United States*, 415 F. 2d 817, 821, n. 2 (5th Cir. 1969).

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4. *Court Experts and Community Monitoring.*

The roles given to the court's experts and to the community monitoring groups were integral to successful implementation of the plan and were not unique to this case. It is common for desegregation courts to use experts, *Swann*, 402 U.S. at 8-11; *Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F. 2d 37 (2d Cir. 1975), and to establish community groups to assist with monitoring implementation of a plan. *E.g.*, *Singleton* v. *Jackson Municipal Separate School District*, 426 F. 2d 1364, 1370 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *Dowell* v. *Board of Education*, 338 F. Supp. 1256, 1272 (W.D. Okla. 1972), *aff'd*, 465 F. 2d 1012, 1015-16 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972). The importance and, indeed, the obligation of adequate monitoring of a school committee that has expressly stated it will voluntarily do nothing to further desegregation is obvious. Moreover, it was reasonable for the court to utilize its experts and the various community councils to monitor any discriminatory inequities that may remain in the system, in light of its findings that the Committee had provided less support for racially isolated black schools (A. 29).

The monitoring role of the experts is particularly crucial, given the control of the resistant Boston School Department over the actual student assignments — the key to any desegregation plan. At a late date the Committee failed to comply with court guidelines regarding assignments (A. 53). Further delay would have jeopardized implementation of the plan (A. 54). Under such circumstances, the Court was warranted, through its experts, in closely supervising the School Department. Finally, this issue if now moot; the assignments are long since complete and the plan is in full operation.

5. *Examination Schools.*

The Committee objects to the court's orders on the examination schools as being a further intrusion into the education realm (Pet. 19), but the objection raises no significant issue. The three examination schools — the elite schools in Boston — were found to be unconstitutionally segregated at the trial on liability. The district court ordered, as interim relief, that the entering seventh grade and small additional entering ninth grade glasses at the grade 7-12 examination schools be 35 percent black and minority (A. 162). The Committee was given discretion to select the admissions criteria that would result in achievement of the required percentages (A. 162). At most, the court's order was partial relief, desegregating only one full grade out of six, and was designed to be temporary pending the development of racially neutral criteria and the desegregation of the elementary schools (A. 41). The district court's order is also consonant with the requirements of state law.[5] The examination schools may not be exempted from even partial desegregation on the unsupported assertion that desegregation in these schools will affect educational quality.[6]

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[6] The Committee's objections are even less valid in light of the Memorandum and Orders Modifying Desegregation Plan issued by the district court on May 3, 1976, in which the plan for desegregating the examination schools was modified. *Id.* at 11-15. Candidates must now score at or above the 50th percentile on either of two ranked lists. One list contains scores on the

[5] Regulations promulgated by the Board of Education pursuant to 1971 Mass. Acts & Resolves, c. 622 (effective Sept. 1, 1975), require, at Reg. 8.10, that:

> [S]elective secondary schools, including but not limited to selective academic high schools [and] technical schools, shall admit qualified applicants of . . . racial and ethnic groups in numbers proportionate to the existence of members of such class in the secondary school population of the geographic area served by that school.

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III. The Decision Of The Court Of Appeals Is Not In Conflict With The Decisions Of Any Other Circuit Court.

The Committee's argument that the decision of the Court of Appeals for the First Circuit, affirming the district court, is in conflict with a decision of the Court of Appeals for the Tenth Circuit does not withstand analysis. *Keyes* v. *School District No. 1, Denver, Colo.*, 521 F. 2d 465 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 806 (1976), is distinguishable on its facts and is consistent in principle with the First Circuit's decision here. *Keyes* reversed the district court for incorporating an extensive plan for bicultural, bilingual education (the Cardenas Plan) into its desegregation order. The Cardenas Plan was characterized by the Tenth Circuit as being "an overhaul of the system's entire approach to education of minorities" that touched

> virtually every aspect of curriculum planning, methodology and philosophy presently the responsibility of local school authorities. . . . [F]or example, the inclusion of specific courses in the curriculum, adoption and publication of specific educational principles, provision of early childhood education (beginning at age three) and adult education for minorities, and provision of adequate clothing for poor minority school children. 521 F. 2d at 481.

Secondary School Admission Test (SSAT) and the other contains grade point averages. The 50th percentile cut off point has been traditional for admission to the examination schools, *id.* at 12, and both SSAT scores and grade point averages have been used by the Committee in the past. The effect of the new criteria will be to reduce the percentage of black and hispanic students entering the seventh grade class to 26 percent. *Id.* at 13.

In the instant case, the Committee has not been deprived of any power over curriculum planning, methodology, or philosophy. The citizen monitoring groups established by the district court here are specifically prohibited from making policy for Boston schools (A. 188). Paired universities may participate in such educational matters only to the extent agreed upon by the Committee and set forth in their contracts (A. 164). Moreover, unlike the situation in *Keyes*, the orders of the court here are consistent with state law. *Compare* Mass. Gen. Laws c. 71, §§ 37I, 37J, *with Keyes*, 521 F. 2d at 482. Finally, the Tenth Circuit, as did the First Circuit here, recognized that the district court did have the power to order programs for minority students so that they could participate equally in the school system. *Id.* at 482-83. The district court's plan for Boston did not venture outside these accepted boundaries.

IV. The Theories Underlying The Petition Would Unwisely Alter Current Doctrine.

Were the Committee's contentions to be accepted, serious difficulties would ensue in implementing remedies for violations of constitutional guarantees. It is well-established that district courts are not limited to shuffling students to overcome unconstitutional school segregation but are obliged to attend as well to discrimination present in instruction, curriculum and allocation of resources. Nonetheless, the Committee would have this Court limit the district court to the use of busing to achieve desegregation, precluding use of more innovative techniques, such as magnet schools, designed to limit the need for exclusively mandatory measures. It would hamstring desegregation courts by depriving them of the power to make their orders effective. The Committee's claims are contrary to the

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established rules of this Court giving district courts the power to deal with practicalities to see that their orders prove effective.

If this case is in any way unique, it is unique in the obdurate resistance of the Committee to any form of real desegregation. Despite findings by the district court, affirmed on appeal, that the Committee defaulted on its constitutional remedial duties, deliberately defied court orders, and followed a course of intransigence and obstructionism (A. 46-47, 65-68, 93), the Committee asks this Court to find that it fulfilled its obligations (Pet 12, 13, 16, 17, 18). The record in this case is plainly otherwise. The Committee's conduct was so blatant that the United States Commission on Civil Rights recommended that the district court consider placing the entire school system into receivership. "Desegregating The Boston Public Schools: A Crisis in Civic Responsibility," United States Commission on Civil Rights (August, 1975). The district court has not followed this recommendation. Rather, faced with an unusually difficult task, it has eliminated segregation "root and branch" with extraordinary patience and sensitivity. The district court, confronted with the "flinty intractable" realities of the complex Boston case, faithfully adhered to the remedial standards established by this Court. *Swann*, 402 U.S. at 6.

Conclusion

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: May 17, 1976

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